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Federal Communications Commission Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Metropolitan Fiber Systems of New York, Inc. d/b/a as FiberNet — File No. I-T-C-93-174

Application for authority, pursuant to Section 214 of the Communications Act for facility or other authorization to provide International Service Between the United States and Canada

MEMORANDUM, OPINION AND ORDER

Adopted: January 20, 1995; Released: February 7, 1995

By the Chief, Telecommunications Division:

I. INTRODUCTION

1. Metropolitan Fiber Systems of New York, Inc. ("MFSNY"), pursuant to Section 214 of the Communications Act of 1934, as amended, submitted the above-captioned application[1] requesting authority to construct a high capacity fiber optic line between the U.S. - Canadian border and a switching center in Buffalo, New York. MFSNY will use the fiber optic line to provide international voice, facsimile, data, and private line service between the United States and Canada. MFSNY intends to provide capacity to U.S. and Canadian carriers authorized to carry international switched and private line traffic, as well as provide private line service directly to end users located in the United States and Canada. MFSNY will provide DS-1 and DS-3 capacity for private lines. Each DS-1 channel will be capable of carrying 24 voice grade equivalent channels and each DS-3 channel will be capable of carrying 28 equivalent DS-1 channels. Capacity will not exceed 12 DS-3 circuits. MFSNY's application went on public notice on May 5, 1993, and on June 4, 1993, AT&T filed a Petition to Deny the application.[2]

II. DISCUSSION

2. The Applicant asserts that granting the application will serve the public interest by expanding the options available to authorized carriers and private line customers located in both the United States and Canada. It will also provide competition, lower prices and provide greater consumer choice in the market for international facilities-based services. Furthermore, according to the applicant, granting the application will enable authorized interexchange carriers in the United States and Canada to obtain the most technologically advanced facilities to meet their transport needs at prices equal to or below those of other carriers.[3] Additionally, the Applicant asserts that MFSNY should be classified as a non-dominant carrier subject to streamlined regulation.[4]

3. AT&T argues against granting MFSNY's application. AT&T's argument, however, is based on the assumption that MFSNY has applied to be a reseller rather than a facilities-based carrier.[5] The record reflects that MFSNY requests authority to construct a high capacity fiber optic line to provide U.S.-Canada services on a facilities basis.[6] Consequently, AT&T's argument is rendered moot.

4. Upon consideration of MFSNY's application, we certify that the present and future public convenience and necessity require the construction of a high capacity fiber optic line, which will be used to provide DS-1 and DS-3 private lines between the United States and Canada.

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[1] FiberNet, Inc. was the original applicant that requested the Section 214 certificate on April 28, 1993. FiberNet is a domestic, non-dominant Competitive Access Provider that provides intrastate and interstate service in several cities in Upstate New York, Cincinnati, Ohio, and St. Louis, Missouri. On March 8, 1994, FiberNet was acquired by Metropolitan Fiber Systems ("MFS"), and MFS assigned FiberNet to a subsidiary, MFSNY. Under the new structure, Fibernet exists as a wholly-owned subsidiary of MFSNY, whose ultimate parent is MFS. Consequently, MFS, MFSNY and FiberNet, Inc., request the Commission to grant the 214 certificate directly to MFSNY and request authority for MFSNY to do business as "FiberNet". Throughout this document, the name "MFSNY" will be used to refer to both FiberNet and MFSNY.

MFSNY, a Delaware corporation, is a wholly-owned subsidiary of MFS Telecom, Inc., which, in turn, is a wholly-owned subsidiary of MFS, a Delaware Corporation. MFS is the largest provider of local competitive telecommunications services in the United States, offering a wide range of voice, data and other enhanced services and systems, primarily over digital fiber optic networks. *Amendment to Application and Notice of Substitution of Counsel*, at 2, December 3, 1993 (*Amendment to Application*). MFS is majority-owned and controlled by U.S. citizens. *Amendment to Application*, at 12.

[2] The following subsequent pleadings were filed: *Opposition to Petition to Deny*, (MFSNY) June 17, 1993; Letter of Keith J. Roland, Counsel for MFSNY, to George S. Li, Chief, International Facilities Division (September 28, 1993); Letter of George S. Li, Chief, International Facilities Division to Keith J. Roland, Counsel for MFSNY (October 8th, 1993) (requesting clarification of the authority sought by MFSNY); Letter of Keith J. Roland, Counsel for MFSNY, to George S. Li, Chief, International Facilities Division (October 15, 1993); *Amendment to Application*, December 3, 1993; *Second Amendment to Application*, May 18, 1994 (*Second Amendment*).

[3] *MFSNY, Application for Authority pursuant to Section 214 of the Communications Act for Facility or other authorization to provide international service between the United States and Canada*, at 2-3.

[4] *MFS International, Inc.*, 9 FCC Rcd 2275, 2276 (1994) (discussing nondominant carrier status).

[5] *AT&T's Petition to Deny Application*, 1-2, June 4, 1993.

[6] *Second Amendment*, at 1-2. Furthermore, MFSNY has consistently stated that it is seeking authority to install, operate and maintain a high capacity fiber optic line from the U.S. - Canadian border at the Peace Bridge Plaza, Buffalo, New York, to the FiberNet node at 350 Main Street, Empire Tower, Buffalo, New York.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, that the application of MFSNY, Inc., File No. ITC-93-174, IS GRANTED and MFSNY is authorized to:

a. construct a high capacity (12 DS-3 capacity) fiber optic line between the United States and Canada;

b. provide international switched voice, facsimile, data, and private line service; and

c. use the facility to transport other carriers' traffic, including international switched voice and private line traffic, and individual customer private line traffic between the United States and Canada.

6. IT IS FURTHER ORDERED that AT&T's Petition to Deny is DENIED.

7. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that MFSNY must file tariffs for the services authorized in this order.

8. IT IS FURTHER ORDERED that MFSNY must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

9. This order is issued under Section 0.261 of the Commission's Rules, 47 C.F.R. § 0.261, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-102

In the Matter of

Revision of the Commission's rules
to ensure compatibility with enhanced
911 emergency calling systems

ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE COMMENTS

Adopted: February 1, 1995; Released: February 7, 1995

By the Chief, Common Carrier Bureau:

1. On September 19, 1994, the Commission adopted a *Notice of Proposed Rule Making*, FCC 94-102, released October 19, 1994, seeking comment on proposals for ensuring the compatibility of private branch exchanges and other private telephone systems with enhanced 911 emergency services. The *Notice* also included the Commission's proposal to adopt rules that would require wireless services to make enhanced 911 services available to mobile radio callers. Public notice of this action appeared in the Federal Register on November 2, 1994, 59 FR 54878.

2. The Commission has received a number of requests to extend the comment period in this proceeding. For example, on January 20, 1995, the Personal Communications Industry Association ("PCIA") filed a motion requesting that the time for filing replies in this proceeding be extended from February 8, 1995 to March 8, 1995. In support of its request PCIA states that approximately seventy (70) parties have filed opening comments totalling well over a thousand pages, and that the issues addressed by the *Notice* are exceedingly complex and technical. PCIA believes that an extension of time would result in a more useful and accurate record.

Similarly, on January 23, 1995, the Association of Public-Safety Communications Offcials-International, Inc. ("APCO") requested that the time for filing replies in this proceeding be extended until March 20, 1995. APCO states that it is reluctant to seek additional time, given that public safety groups like itself are anxious to resolve these issues. APCO states, however, that the public safety community feels a special responsibility to analyze carefully and respond to the comments of the other parties, and it believes that it needs an additional 40 days to perform its duty.

3. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. Section 1.46, it is Commission policy that extensions of time not be routinely granted. We find, however, that petitioners have shown good cause for the requested extension. The public safety issues raised in this proceeding are obvious and significant: the *Notice* found that private branch exchange equipment should conform to the needs of its owners while ensuring that the location of callers to 911 are properly identified to public safety answering points, and that wireless service providers must be able to ensure that mobile radio units provide the same level of access to 911 emergency services as is generally available to wireline customers. The technical complexity needed to achieve these goals, as well as the privacy implications which must be considered, require that we ensure an adequate opportunity to develop a complete record. In their petitions, both PCIA and APCO have noted the extensive filings--already over 1500 pages--which have been entered in this proceeding. We agree that the public interest would be served by granting an extension of time in which to file replies to the *Notice*. Accordingly, we will grant the requested relief.

4. Accordingly, IT IS ORDERED that the Requests for Extension of Time filed by PCIA and APCO are GRANTED.

5. IT IS THEREFORE ORDERED that the date for filing replies to the *Notice of Proposed Rule Making* in this proceeding IS EXTENDED to March 17, 1995.

6. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), and Sections 0.204(b), 0.291 and 1.46 of the Commission's Rules, 47 C.F.R. §§ 0.204(b), 0.291 and 1.46.

7. For further information concerning this proceeding, contact Alan Thomas, Domestic Facilities Division, Common Carrier Bureau, (202) 634-1802.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Chattanooga Cable TV Company, Chattanooga, TN — LOI-93-51

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In response to an FCC Form 329 complaint filed November 15, 1993, against Chattanooga Cable TV Company, a Scripps Howard system ("Scripps Howard"), the Commission issued Letter of Inquiry 93-51 ("LOI") to Scripps Howard on December 13, 1993.[1] The LOI asked Scripps Howard to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. Scripps Howard responded to our LOI by letter dated January 13, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming service.[2] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[3]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[4] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[5] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[6] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[7] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[8] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[9] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[10] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[11]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[12] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Chattanooga Cable TV Company, Scripps Howard System, LOI 93-51 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Scripps Howard. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Scripps Howard to make refunds to subscribers in regard to Scripps Howard's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[3] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[4] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[5] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1).

[6] *Id.*

[7] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2).

[8] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[9] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

[10] H.R. Rep. No. 628 at 79.

[11] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[12] *Rate Order* ¶ 451.

III. FACTS

6. In its response, Scripps Howard states that it is constructing a new fiber optic system that was partially complete as of the date of its response. Customers in rebuilt areas (the "new system") are offered 48 channels and customers in non-rebuilt areas (the "old system") are offered 27 channels. Before September 1, 1993, Scripps Howard's services included a 12 channel basic tier on both the old and new systems, called Lifeline Basic, for $9.99 per month, a 15 channel cable programming service tier on the old system and a 25 channel cable programming service tier on the new system, both called Expanded Service, for $12.99 per month. On the new system, customers were also offered an additional six channel cable programming service tier, called the Entertainment Tier, for $3.95 per month.

7. The following chart summarizes Scripps Howard's service tier offerings prior to September 1, 1993:

Old System:

Offering	Channels	Price
1. Lifeline Basic	12	$ 9.99
2. Expanded Service	15	$12.99
Total	27	$22.98

New System:

Offering	Channels	Price
1. Lifeline Basic	12	$ 9.99
2. Expanded Service	25	$12.99
3. Entertainment Tier	6	$ 3.95
Total	43	$26.93

8. On September 1, 1993, the date our rate regulations became effective, Scripps Howard restructured its service offerings. Scripps Howard's restructured services included a 12 channel basic tier on both the old and new systems, called Lifeline Basic, for $6.56 per month, a 15 channel cable programming service tier on the old system for $13.44 per month and a 30 channel cable programming service tier on the new system for $16.39 per month, called Expanded Service. In addition, Scripps Howard removed two of the new system's Entertainment Tier channels, The Learning Channel and E!, from that tier and offered them as part of the 30 channel Expanded Service available to subscribers on the new system. It offered four of the six channels previously on the new system's Entertainment Tier along with two new channels -- Court TV and Encore -- in a package on the new system called "Entertainment Pak." Neither Court TV nor Encore had been offered previously on the new or old Scripps Howard system. The six channels comprising the Entertainment Pak (Court TV, Encore, The Sci-Fi Channel, The Cartoon Network, Comedy Central and Nostalgia Network) were available to subscribers on the new system as a package for $3.95 per month or on an individual basis for $1.00 each per month.[13] The Entertainment Pak was not available on the old system.

9. The following chart summarizes Scripps Howard's service tier options as of the date of its response to our LOI:[14]

Old System:

Offering	Channels	Price
1. Lifeline Basic	12	$ 6.56
2. Expanded Service	15	$13.44
Total	27	$20.00

New System:

Offering	Channels	Price
1. Lifeline Basic	12	$ 6.56
2. Expanded Service	30	$16.39
3. Entertainment Pak	6	$ 3.95
Total	48	$26.90

10. At the time of Scripps Howard's response, 2,611 customers on the new system received the Entertainment Pak package, while there were 71 subscriptions to individual channels in the package.

IV. DISCUSSION

11. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[15] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[16] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[17] First, we examine whether Scripps Howard's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

12. Scripps Howard's restructuring on its new system effective September 1, 1993, involved taking four channels from its six channel Entertainment Tier (The Cartoon Network, Comedy Central, Nostalgia, and the Sci-Fi Channel) and adding two channels that previously had not been offered on the new or old system (Encore and Court TV), to create the six-channel package that it alleges is not regulated. In so doing, Scripps Howard avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Scripps Howard had not restructured its service offerings on its new system on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, Scripps Howard's response suggests that customers on

[13] Scripps Howard states that Encore is available on an individual basis for either $1.00 or $2.00, depending on the customer's premium service level.

[14] This Order does not evaluate Scripps Howard's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

[15] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

[16] *Rate Order* ¶ 451.

[17] *Id.* at ¶ 453.

the new system that were receiving the Entertainment Tier prior to rate regulation continued to receive Entertainment Pak after the restructuring,[18] and there appears to be no sufficient justification for Scripps Howard's restructuring other than to avoid rate regulation.

13. Other factors corroborate our view that Scripps Howard's restructuring on its new system may have had the effect of avoiding rate regulation. First, it offered this offering on the eve of regulation. Second, its response suggests that it automatically subscribed existing Entertainment Tier customers to the September 1, 1993 Entertainment Pak package. In light of these facts, it appears that Scripps Howard's restructuring of its offerings on its new system may have evaded rate regulation. We will not find an actual evasion occurred, however, if Scripps Howard's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then Scripps Howard would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[19]

14. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[20] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[21] This is not the type of offering that Scripps Howard and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations (and, in the case of Scripps Howard, added two channels that previously had not been offered on its system).

15. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[22]

16. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the four services, because the sum of the per channel prices is $6.00 (assuming a $1.00 per month charge for Encore) in contrast to the package price of $3.95. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." Our review of Scripps Howard's submission reveals that of the subscribers taking either individual channles or the package, more than 97 percent subscribe to the package. Although most customers subscribe to the package, our test does not specify what percentage would indicate that an offering is "a realistic service offering." However, this fact, together with the other factors present in this case,[23] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

17. Even if we were to apply the 15 interpretative guidelines set forth in our *Second Reconsideration Order*,[24] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Scripps Howard's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (66 percent) was removed from a regulated tier, the absolute

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[18] Scripps Howard states that as homes were added to the new portion of the system, subscribers were given the option of subscribing to the Entertainment Tier. With respect to customers that already were on the new system as of September 1, 1993, however, Scripps Howard's correspondence to its subscribers indicates that subscribers were simply notified that the Entertainment Pak channels were "[a]vailable for purchase on a per channel basis if desired."

[19] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 46. However, in order to determine whether Scripps Howard evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[20] *Rate Order* ¶ 329.

[21] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[22] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order")*, the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of a la carte channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[23] *See, e.g.*, ¶ ¶ 12-13, *supra*.

[24] *Id.* at ¶ 196.

number (four) was not overwhelming.[25] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to Scripps Howard that its restructuring on its new system was not a permissible a la carte package.

18. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[26] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Scripps Howard's restructuring on its new system was not a permissible a la carte package.

19. For that reason, we do not think that it would be equitable to subject Scripps Howard to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation. In contrast, Scripps Howard attempted to treat only four channels previously offered on a cable programming service tier and two channels not previously offered on its system as an unregulated collective offering of a la carte channels. Furthermore, Scripps Howard still maintained a substantial cable programming service tier which was supuplemented by two of the channels which were formerly on the Entertainment Tier. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[27] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[28]

20. We will not require Scripps Howard to restructure its tiers on its new system so as to return the channels offered in the a la carte package to rate-regulated tiers.[29] Instead, on a prospective basis, therefore, we will consider Scripps Howard's Entertainment Pak a new product tier[30] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Scripps Howard's six channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Scripps Howard or its Chattanooga customers to the confusion and transaction costs that would result if we required Scripps Howard to retier.

V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that Scripps Howard's Entertainment Pak package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

22. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[25] *Id.*
[26] *See Going Forward Order* at ¶ 40.
[27] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").
[28] *Second Reconsideration Order* ¶ 196.
[29] We are not precluding Scripps Howard from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.
[30] *See Going Forward Order* ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Prime Cable of Alaska, L.P. CUID No. AK0028
Anchorage, Alaska

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 1994; Released: December 19, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Prime Cable of Alaska, L.P. ("Prime Cable") was charging for its cable programming service ("CPS") tier in Anchorage, Alaska, CUID No. AK0028. Prime Cable has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order will address the reasonableness of Prime Cable's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint was served on Prime Cable on November 15, 1993. The Commission received the complaint on November 16, 1993. (Prime Cable has moved to dismiss subsequent complaints filed by other cable subscribers. Because we have accepted the November 15, 1993 complaint as properly filed, we find it unnecessary to rule on Prime Cable's motions to dismiss these later filed complaints.)

5. Prime Cable filed its first FCC Form 393 in response to this complaint on December 6, 1993. Prime Cable amended its justification twice: first on May 17, 1994 and then on December 6, 1994 in response to a Commission letter citing still unresolved deficiencies in Prime Cable's amended showing.[11]

III. DISCUSSION

6. Prime Cable asserts that its monthly CPS tier price of $15.22 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $15.22 as calculated in the filing. Upon review of Prime Cable's Form 393, we have found no apparent errors that would require a recalculation of Prime Cable's maximum permitted CPS price.[12]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Prime Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Prime Cable implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] Letter from John M. Spencer to Rudolph H. Green, Vice President and General Counsel, Prime Cable (November 28, 1994).

[12] We note that a number of complainants expressed concern about converter charges. The local franchising authority, however, has primary responsibility for regulating converter charges along with other equipment charges, installation charges and basic tier rates. In this case the local franchising authority -- the Alaska Public Utilities Commission -- has certified with the Commission to regulate these charges.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Prime Cable of Alaska, L.P.'s showing supports a maximum reasonable CPS tier price of $15.22 per month (plus franchise fee) for the period November 16, 1993 to May 14, 1994.[13]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the November 15, 1993 complaint against the cable programming service price charged by Prime Cable of Alaska, L.P. in Anchorage, Alaska, CUID No. AK0028, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by Prime Cable of Alaska, L.P. with respect to Anchorage, Alaska, CUID No. AK0028, for the period of November 16, 1993 to May 14, 1994, justifies a maximum price of $15.22 per month (plus franchise fee) for Prime Cable of Alaska, L.P.'s cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] This finding is based solely on the representations of Prime Cable listed in paragraph 5, supra. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Withdrawal of FCC Form 329 Rate Complaints Against Coldwater Cablevision	MI0052 City of Sturgis MI0302 Sturgis Township
Withdrawal of FCC Form 329 Rate Complaints Against River Raisin Cablevision	MI0765 City of Monroe MI0531 Frenchtown Charter Township

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 1994; Released: December 19, 1994

By the Chief, Cable Services Bureau:

1. In each of the cases noted above, the local franchising authority (LFA) filed a complaint with this Commission alleging that the prices charged by Coldwater Cablevision (Coldwater) or River Raisin Cablevision (River Raisin) for cable programming service tier (CPS) services in its community were unreasonably high. These complaints, and the local franchising authorities and filing dates, are noted at Attachment A. Between September 30 and October 18, 1994, each of these LFAs wrote to the Commission to withdraw its CPS complaints.[1] In each case, the LFA was the only complainant who filed with this Commission. Our jurisdiction to regulate CPS rates arises with the filing of a valid complaint against those rates. The withdrawal of the only complaint against an operator's CPS rates in a community constitutes the termination of our jurisdiction to regulate those rates. We will allow the withdrawal of these complaints, and our review of these filings will therefore be terminated.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] In each case captioned above, C-TEC did file either an FCC Form 393 benchmark rate justification submission, or a cost of service rate justification submission.

4. This Commission has now received from each of the captioned local franchising authorities a letter stating that it wished to withdraw its CPS rate complaint against Coldwater or River Raisin. Under our rules, this Commission's authority to regulate CPS cable rates arises when a valid complaint against those rates is filed. In each case noted here, the LFA is the onlycomplainant against this operator in this community. Our mandate is to "protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a system were subject to effective competition."[9] While our rules forbid collusive agreements between operators and local franchising authorities regarding forebearance from rate regulation, there is no evidence of such an agreement here. In fact, the LFA in each case here states that it has completed a rate review of the basic rates, and has found them reasonable. It is on the basis of this finding of reasonableness, rather than on the basis of an underlying agreement to forebear, that these LFAs are seeking to withdraw their CPS rate complaints. We will accordingly allow these complainants to withdraw their complaints. Because our review of the rate justification showings is predicated on the existence of a rate complaint, in those instances where the operator no longer faces rate complaints in the above-noted communities, we are terminating our review of those filings.

5. Accordingly, IT IS ORDERED that permission to withdraw the FCC Form 329 rate complaints against cable programming service rates in the above-noted communities IS GRANTED, and the review of the resulting rate justification filings IS TERMINATED.

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[1] The dates of all withdrawal letters are noted in Attachment A.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993) (Cable Act of 1992).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[6] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) (*Benchmark Order*); 47 C.F.R. § 76.922(b).

[7] *See Benchmark Order*, 9 FCC Rcd at 4190, paras. 150-152.

[8] *Id.*

[9] Conference Report on the Cable Act of 1992, at 62. *See also*, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) (*Rate Order*) at 5669.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Attachment A

CUID No., Local Franchising Authority	Complaints Filed[10]	Complaints Withdrawn
Coldwater Cablevision		
MI0052 City of Sturgis	11/18/93	9/30/94
MI0302 Sturgis Township	11/19/93	10/3/94
River Raisin Cablevision		
MI0765 City of Monroe	11/18/93	10/18/94
MI0531 Frenchtown Charter Township	11/29/93	9/28/94

[10] The date given is the date the LFA first filed a complaint. In some cases, the LFAs filed duplicate complaints at later dates.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TWIN COUNTY TRANS VIDEO, INC.

Petition for Reconsideration

of Certification of
Township of Upper Nazareth, PA
to Regulate Basic Cable Service Rates
(PA1289)

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 19, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On January 14, 1994, Twin County Trans-Video, Inc. ("Twin County") filed a timely petition for reconsideration challenging the certification of the Township of Upper Nazareth, Pennsylvania ("Township") to regulate rates for basic cable service and associated equipment.[1] On August 19, 1994, Twin County filed its supplemental pleading in response to the Commission's July 29, 1994 Order.[2] The Township did not file an opposition to Twin County's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

Petitioner's Contentions

3. Twin County bases its challenge on the competing provider test for effective competition set forth in the 1992 Cable Act and our rules.[8] Twin County argues that its system serving the Township of Upper Nazareth is subject to effective competition because its franchise area is: 1) served by itself and Service Electric Cable TV, Inc. ("Service Electric"), an unaffiliated multichannel video programming distributor ("MVPD") and that each of them offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to Twin County, the smaller operator, exceeds 15 percent of the households in the franchise area.

4. Twin County states that there are a total of 1,036 total housing units[9] in Upper Nazareth Township,[10] the franchise area. Twin County states that it passes 777 of the 1,036 housing units, or 75 percent of the total number of housing units. In addition, Twin County states that it serves 392 of the 1,036 housing units or 37.8 percent of the total

[1] The Township filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition (FCC Form 328) on November 17, 1993. Its certification became effective on December 17, 1993.

[2] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[7] 47 C.F.R. § 76.911(c).

[8] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if the franchise area is: 1) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area. Communications Act of 1934 § 623(l)(1)(B), 47 U.S.C. §543(l)(1)(B); 47 C.F.R. §76.905(b)(2).

[9] "Housing units" are not the same as "households," the term used in the Cable Act and the Commission's rules. The count of "households" in the 1990 Census reflects only occupied housing units. *See* bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. "Housing units" reflect occupied and unoccupied housing units.

[10] "Housing units" are not the same as "households," the term used in the Cable Act and the Commission's rules. The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. "Housing units" reflect occupied and unoccupied housing units.

number of housing units within the franchise area. Twin County submits a copy of the relevant page from the 1990 Census Data information[11] applicable to the Township, which indicates that there are 1,036 total housing units in Upper Nazareth Township. In addition, Twin County submits a computer print-out which indicates that it passes 777 housing units in the franchise area. This same print-out demonstrates that Twin County serves 392 subscribers. Finally, we note that Twin County provides approximately 48 channels of programming, including at least 32 non-broadcast channels.[12]

5. With respect to Service Electric, Twin County states that Service Electric passes 1,134 housing units within the Township.[13] In addition, it states that Service Electric serves 632 subscribers. As support, Twin County submits a letter from Service Electric in which Service Electric states that its cable system passes 1,134 "homes" and serves 632 subscribers. In addition, we note that Service Electric offers a total of at least 47 channels of programming, including 32 non-broadcast channels.[14]

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[15] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[16] Based on the totality of the evidence presented, we find that Twin County has met this burden.

Disposition of Twin County's Direct Effective Competition Challenge

7. The first prong of the competitive providers test for effective competition requires that the franchise area be served by at least two unaffiliated MVPDs, each of which offers comparable programming to at least 50 percent of the households in the franchise area.[17] Twin County asserts that it passes 777 of the 1,036 housing units, or 75 percent of the total number of housing units in its franchise area. In addition, Twin County states that Service Electric passes 1,134 "homes" in the franchise area. The 1990 Census data submitted by Twin County indicates that there are 1,036 total housing units (i.e. occupied and unoccupied), including 1,008 households (i.e., occupied housing units) in Upper Nazareth Township. Thus, it is clear that Twin County relied on the number of housing units (occupied and vacant) passed. Yet our rules require the number of households to be the reference point for purposes of gauging effective competition under this test, just as it is required under the low penetration" test.[18] However, we recognize that determining the number of households (i.e. occupied housing units) which are passed by a cable operator, as opposed to the number which exist in the franchise area, may not be easily accomplished. Such information is not provided by the Census data we routinely urge operators to rely upon for purposes of the low penetration test, and we understand that such information may not generally be available to or collected by operators. Because we are concerned to identify franchise areas which are subject to effective competition between or among providers, we will examine the totality of the evidence submitted by Twin County to see if conclusions can be drawn from it about the percentage of households passed by Twin County and Service Electric.

8. As stated earlier, the 1990 Census data submitted by Twin County indicates that there are 1,036 total housing units and 1,008 households (that is, occupied housing units) in Upper Nazareth Township. Twin County states that it passes 777 housing units in the franchise area. If we compare the number of households with the total number of housing units, we find that 28 housing units, or approximately 2.7 percent of the total number of housing units were unoccupied. If we reduce the number of housing units passed by Twin County by 2.7 percent, we arrive at a rough household number of 756. This number is 75 percent of the total number of households in the franchise area. Alternatively, if we assume as a worst case that Twin County passes all of the unoccupied housing units in the franchise area, and so subtract 28 from 777, we are left with a total of 749 households passed, which is 74.3 percent of total households. Under either scenario, the evidence permits us to conclude that Twin County passes more than 50 percent of the households in the franchise area.

9. Turning to Service Electric, Twin County submits a letter from Service Electric stating that Service Electric passes 1,134 "homes" and serves 632 subscribers. Our calculations show that 632 subscribers is 62.3 percent of the total number of households in the franchise area. Therefore, Service Electric clearly passes more than 50 percent of the households in the franchise area. Thus, the evidence permits us to conclude that both Twin County and Service Electric pass more than 50 percent of the households in the franchise area.

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[11] As the Bureau has stated recently, the 1990 Census is an appropriate source of household data. *Effective Competition Order, supra.*

[12] *See 1994 Television and Cable Factbook*, at D-1468. Competing MVPDs must offer comparable video programming to households in the franchise area. *See* 47 C.F.R. § 76.905(b)(2). As the Commission has stated previously, in order to provide "comparable" video programming, a MVPD must provide at least 12 channels of video programming, including at least one non broadcast channel. *See Rate Order*, at 5667.

[13] Supplement to Petition for Reconsideration of Certification, p.2, citing Exhibit 3, Letter of John J. Capparell, August 16, 1994. Twin County states that Service Electric passes 1,134 households, yet Twin County acknowledges only 1,036 total housing units and 1,008 occupied housing units according to the 1990 Census. Even if Service Electric's 1,134 figure represents housing units, the number does not comport with the total housing units published by the Department of Commerce's Bureau of Census. Since the Census data is for 1990, the discrepancy may be reasonably attributed to housing growth in the Township. Service Electric's data is therefore accepted for purposes of calculating its homes passed. Nonetheless, for the sake of consistency, we have relied upon the Census data for the total number of households in the Township.

[14] *See 1994 Television and Cable Factbook*, at D-1408.

[15] 47 C.F.R. § 76.906.

[16] 47 C.F.R. § 76.911(b)(1).

[17] 47 C.F.R. §76.905(b)(2)(i).

[18] *See* Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. §76.905(b)(1) (measuring low penetration effective competition by percentage of households subscribing to cable in the franchise area); Communications Act of 1934 § 623 (l)(1)(B), 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. §76.905(b)(2) (measuring direct effective competition by percentage of households passed and percentage of households subscribing to cable in the franchise area).

10. With respect to programming comparability, we find that the programming of the two operators are comparable. We note that each operator offers over 40 channels with more than 30 non-broadcast channels[19] -- this satisfies the Commission's programming comparability criteria.

11. With regard to the second prong of the competitive providers effective competition test, we find that the evidence shows that more than 15 percent of the households in the franchise area subscribe to the multichannel video programming other than from Service Electric, the largest MVPD. Here, Twin County has submitted sufficient evidence that Twin County, the smaller of the two competitors, serves 392 of the 1,008 households or 38.8 percent of the households in the franchise area.

12. As Twin County has submitted sufficient evidence demonstrating that its cable system serving Upper Nazareth Township is subject to effective competition from another cable operator, its petition is granted.

III. ORDERING CLAUSES

13. Accordingly, IT IS SO ORDERED that the petition for reconsideration filed by Twin County Trans Video, Inc. dba Twin County Cable challenging the certification of the Township of Upper Nazareth, Pennsylvania to regulate basic cable rates IS GRANTED.

14. IT IS FURTHER ORDERED that the certification of the Township of Upper Nazareth, Pennsylvania to regulate the basic service rates of Twin County Trans Video, Inc. dba Twin County Cable IS RESCINDED.

15. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[19] *See* paragraphs 4 and 6, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LaSalle Telecommunications, Inc. CUID No. IL0955 (Chicago, IL)

Cost of Service Filing To Support
Cable Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 19, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On June 29, 1994, LaSalle Telecommunications, Inc. ("LaSalle"), serving Franchise Area 4 of the City of Chicago,[1] filed a cost of service showing with the Commission in response to a complaint regarding the cable programming service ("CPS") rate in effect in LaSalle's franchise area.[2] On September 2, 1994, LaSalle filed amended cost of service data.[3] On September 12, 1994, in response to a request by Commission staff, LaSalle submitted additional information relating to the motion to dismiss included in LaSalle's filing.

2. LaSalle's cost of service filing seeks to establish that its CPS rate of $11.29 per month for the period September 1, 1993, to May 14, 1994, is justified based on its cost of providing CPS.[4] LaSalle includes with its response a motion to accept the late-filed response as well as a motion to dismiss the complaint on the grounds that effective competition exists in LaSalle's franchise area.

3. We conclude that competition exists in Franchise Area 4, and therefore that the complaint against LaSalle should be dismissed. Consequently, we do not address the issue of whether LaSalle's CPS rate is cost-justified.

II. DISCUSSION

4. **Late-filed Response:** LaSalle moves to have the Commission accept its late-filed response. The complaint underlying this case was served on the operator on April 8, 1994, thus establishing May 7, 1994, as Chicago Cable's filing deadline for responding to the complaint.[5] LaSalle filed its cost of service showing on June 29, 1994. LaSalle later amended its showing on September 2, 1994.

(a) LaSalle maintains that it overlooked the filing deadline due to confusion caused by the return of the initial complaint filed by the Cable Administrator of the City of Chicago. Chicago Cable asserts that the Cable Administrator's unsuccessful attempt to file complaints for the three franchise areas that LaSalle and its affiliated companies serve, while at the same time the Cable Administrator was seeking certification to regulate only two of the three franchise areas, caused LaSalle to overlook the 30-day deadline for a response to the LaSalle complaint. LaSalle also relies on the *May 23 Order* which created a window during which cable operators might correct deficiencies in filings related to CPS rate complaints.[6] LaSalle maintains that among the "common deficiencies" for which the *May 23 Order* permits correction is the failure to make a rate justification within the 30-day period provided for in 47 C.F.R. § 76.956. LaSalle also argues that neither the Commission nor any interested party will be prejudiced by the timing of LaSalle's rate justification submission.

(b) In failing to respond to the complaint served since April 8, 1994, LaSalle was in default of the Commission's rules. LaSalle's claim of confusion regarding the Cable Administrator's certification filings is insufficient to explain or excuse LaSalle's failure to file a timely response to the Cable Administrator's CPS complaint. Further, the window of opportunity provided by the *May 23, 1994 Order* addresses situ-

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[1] LaSalle is affiliated with two other companies -- South Chicago Cable, Inc. and Communications & Cable of Chicago, Inc. -- which provide cable television service to Chicago Franchise Area 1 and Franchise Area 5, respectively. All three companies do business in their respective franchise areas under the name "Chicago Cable TV."

[2] The complaint to which LaSalle responds was filed by the Cable Administrator of the City of Chicago. It was initially filed with the Commission on February 28, 1994. On March 16, 1994, the Commission returned the complaints to the complainant as defective. On April 8, 1994, the complainant timely refiled and served the complaints. Pursuant to 47 C.F.R. § 79.956, LaSalle was required to respond to the complaints within 30 days, thus establishing May 7, 1994, as LaSalle's filing deadline with respect to its response to the complaint.

[3] LaSalle submitted the September 2, 1994 amendment to correct certain erroneous calculations in its filing. This amendment was not made in response to a Commission request.

[4] In its May 3, 1993 *Rate Order*, the Commission determined that a benchmark and price cap approach should serve as the primary method for regulating basic service and CPS rates. The Commission also concluded that because the benchmark methodology might not produce fully compensatory rates in all cases, it was appropriate to permit operators, as an alternative, to justify rates based on costs, using individual cost of service showings. The cost of service approach was intended to be used only if an operator believed that the maximum rate permitted under the benchmark formula would not enable the operator to recover costs reasonably incurred in providing rate regulated cable services. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5794-95.

[5] *See supra*, note 2.

[6] Cable Operators' Rate Justification Filings, Sections 76.945, 76.956 of the Commission's Rules, Order, DA 94-526 (released May 23, 1994) (*"May 23 Order"*); *see also*, Cable Operators' Rate Justification Filings, Order, DA 94-619 (released June 14, 1994).

ations where a cable operator failed to file a rate justification based on its decision to request dismissal of the rate complaint or its decision to file a cost of service showing. In this case, LaSalle did not respond in any manner to the complaint filed on April 8, 1994. Under our rules, a cable operator that is deemed to be in default may be subject to a finding that its rates are unreasonable and appropriate relief may be mandated by the Commission.

(c) Our decision to review LaSalle's rate justification does not condone LaSalle's failure to observe the Commission's filing requirements with respect to the April 8, 1994 complaint to which it responds. We reiterate that, in the future, in order to preserve the integrity of our cable rate regulation process, we will impose forfeitures and other sanctions as appropriate for violations of our rules.

5. **Motion to Dismiss:** LaSalle asks the Commission to dismiss the complaint on the grounds that effective competition exists in Franchise Area 4. LaSalle argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in its franchise area.

(a) The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated.[7] The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service.[8]

(b) LaSalle claims that it serves only 53,632 of the 217,242 "dwelling units" (which includes both occupied and unoccupied housing units) in Franchise Area 4, or 24.69 percent of the total number of "dwelling units." Although maintaining that both occupied and unoccupied housing units should be used in calculating the operator's penetration rate, LaSalle also notes that if only occupied dwelling units were used, it serves 27.68 percent of the total 193,762 occupied housing units. As supporting documentation, LaSalle provides 1990 Census data[9] which shows that there are 217,242 total occupied and unoccupied housing units, and 193,762 occupied housing units, in Franchise Area 4. LaSalle also submits a computer print-out with subscriber information to support its claim that it serves 53,632 subscribers in the franchise area. Finally, LaSalle provides an affidavit under penalty of perjury by a responsible official of the company certifying that the data included in the motion to dismiss is accurate.[10]

(c) In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist, with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[12]

(d) As a preliminary matter, we note that we have previously rejected the argument espoused by LaSalle that unoccupied housing data (in addition to occupied housing data) should be used in calculating an operator's penetration rate.[13] As the Commission stated recently, "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units."[14] The 1990 Census "household" data reflects only occupied housing units.[15] Thus, we require that for purposes of establishing the existence of effective competition, the penetration rate must be calculated based solely on occupied dwelling units (or "households" as used in the 1990 Census).

(e) Even using only occupied housing data, we find that LaSalle has met its burden of establishing the existence of effective competition. LaSalle has submitted sufficient evidence demonstrating that its cable system serves 53,632 of the 193,762 occupied households, or 27.68 percent of the occupied households, within its franchise area. Because this penetration rate is less than 30 percent, we find that LaSalle's system serving Franchise Area 4 of the City of Chicago is subject to effective competition. Accordingly, we will grant LaSalle's motion to dismiss the complaint.

III. CONCLUSION

6. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint filed against LaSalle Telecommunications, Inc. regarding its CPS rate in the above-referenced community IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[7] 47 C.F.R. § 76.905(a).
[8] 47 C.F.R. § 76.905(b)(1).
[9] As the Commission stated recently, 1990 Census data is an appropriate source for household data. Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates, Order, 9 FCC Rcd 3656 (1994).
[10] Affidavit of Morgan H. McChesney, General Manager, dated June 28, 1994.
[11] 47 C.F.R. § 76.906.
[12] 47 C.F.R. § 76.911(b)(1).
[13] *See* Petition of Barden Cablevision for Reconsideration of Certification of Detroit Cable Communications Commission to Regulate Basic Cable Rates, Memorandum Opinion and Order, DA 94-64, at 5-6 (released September 1, 1994).
[14] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4324 (1994).
[15] Bureau of the Census, 1990, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 19, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON GTE'S AMENDMENTS TO ITS SECTION 214 APPLICATION AND GTE'S RESPONSE TO DATA REQUEST W-P-C-6955, W-P-C-6956, W-P-C-6957, W-P-C-6958

On December 16, 1994, GTE Service Corporation (GTE) filed four amendments to its Section 214 Applications for authority to construct, operate, own, and maintain facilities to provide video dialtone service. GTE South Incorporated amended its application for the Manassas, Virginia area, which was initially filed on May 23, 1994, and amended on June 15 and October 20, 1994 (W-P-C-6955). GTE Florida amended its application for the Pinellas County and Pasco County, Florida areas, which was filed on May 23, 1994 (W-P-C-6956). GTE California amended its application for Ventura County, which was filed on May 23, 1994, and subsequently amended on June 15, 1994 (W-P-C-6957). GTE Hawaiian Telephone amended its application for the Honolulu area, which was filed on May 23, 1994, and amended on June 15, 1994 (W-P-C-6958).

In addition, GTE filed a response to questions posed by the Common Carrier Bureau's letter of December 9, 1994, requesting additional information on GTE's four pending video dialtone applications.

Interested parties are invited to file comments on the amendments or GTE's Response. Comments should be filed by **January 18, 1995**, and reply comments should be filed by **February 2, 1995**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Three copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc. 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the amendments and GTE's Response can be obtained from ITS at (202) 857-3800. The amendments and GTE's Response are available for review and photocopying at the FCC Public Reference Room, 6th Floor, 2025 M Street, N.W., Washington, D.C., from 8:30-12:30 and 1:30-3:00, Monday through Thursday.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-158

In the Matter of

Amendment of Policies and Rules
Concerning Operator Service
Providers and Call Aggregators

NOTICE OF PROPOSED RULE MAKING AND NOTICE OF INQUIRY

Adopted: December 28, 1994; Released: February 8, 1995

Comment Date: March 9, 1995
Reply Comment Date: March 24, 1995

By the Commission:

I. INTRODUCTION

1. This Notice of Proposed Rule Making and Notice of Inquiry solicits comment on proposed changes to our rules and policies governing operator service providers (OSPs)[1] and call aggregators.[2] First, we propose to amend our rules to require branding[3] to the parties on both ends of a collect call. Second, we propose to amend our rules to establish minimum standards for aggregators to follow in routing and handling emergency telephone calls. Third, we solicit comment on whether the definition of "aggregator" should be expanded to apply to correctional institutions and what, if any, changes should be made in our treatment of entities that provide interstate telecommunications services to prisons and other correctional facilities. Finally, we solicit comment on whether the Commission's rules should be amended to prescribe a time limit for updating the consumer information posted on or near aggregator telephones in the event the presubscribed OSP has changed.

II. BACKGROUND

2. Pursuant to the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA),[4] the Commission adopted comprehensive regulations governing the practices and services of OSPs and the call aggregators with whom they contract to provide operator services.[5] These regulations established rules concerning consumer information, call blocking, restrictions on certain charges, and equipment capabilities. Further, the Commission established minimum standards for OSPs to use in routing and handling emergency telephone calls.[6] Subsequently, with the Telecommunications Authorization Act of 1992 (TAA),[7] Congress amended Section 226(d)(4)(A) to require the Commission to establish minimum standards for aggregators, as well as OSPs, to use in routing and handling emergency calls.[8]

III. DISCUSSION

A. Section 64.708 -- Definition of "Consumer" When Branding Collect Calls.

3. Section 226(b)(1)(A) of the Communications Act of 1934, as amended (Act) and Section 64.703(a)(1) of the Commission's rules require an OSP to identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call.[9] This identification is known as "call branding."[10] Section 226(a)(4) of the Act and Section 64.708(d) of the Commission's rules define a "consumer" as "a person initiating any interstate telephone call using operator services."[11]

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[1] For purposes of the Commission's operator service rules, Sections 64.703 through 64.707 and Section 68.318, "[o]perator services means any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than: (1) Automatic completion with billing to the telephone from which the call originated; or (2) Completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer." 47 C.F.R. § 64.708(g). "Provider of operator services means any common carrier that provides operator services or any other person determined by the Commission to be providing operator services." *Id.* § 64.708(i). In prescribing a mechanism for payphone compensation, we have said on two occasions that the second exclusion in the definition of "operator services" -- "completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer" -- was not intended by Congress to apply in the payphone compensation context. Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35: Second Report and Order, 7 FCC Rcd 3251, 3261 (1992); Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 7151, 7159 & n.89 (1993).

[2] An "aggregator" is "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 C.F.R. § 64.708(b).

[3] "Call branding" is the process by which an OSP audibly and distinctly identifies itself to the consumer who uses its operator services. *See* 47 U.S.C. § 226(b)(1)(A); 47 C.F.R. § 64.703(a)(1).

[4] Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified as 47 U.S.C. § 226).

[5] *See generally* Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313: Report and Order, 6 FCC Rcd 2744 (1991) (hereinafter *Report and Order);* Order on Reconsideration, 7 FCC Rcd 3882 (1992) (hereinafter *Reconsideration Order).* A complete discussion of the background of these rule making efforts is contained in the *Report and Order,* 6 FCC Rcd at 2746-48, and in the *Reconsideration Order,* 7 FCC Rcd at 3882-83.

[6] 47 C.F.R. § 64.706.

[7] Pub. L. 102-538, 106 Stat. 3543 (1992).

[8] 47 U.S.C. § 226 (d)(4)(A), as amended.

[9] 47 U.S.C. § 226(b)(1)(A); 47 C.F.R. § 64.703(a)(1).

[10] *See* n.3, *supra.*

[11] 47 U.S.C § 226(a)(4); 47 C.F.R. § 64. 708(d).

4. OSPs offer collect calling services that raise an unresolved issue regarding branding.[12] The question of which party to a collect call should be treated as the "consumer," and is therefore entitled to branding, was not specifically addressed in Section 226 and the implementing regulations. Section 226, however, directed the Commission to conduct a rule making proceeding to prescribe regulations to ensure that consumers are protected from unfair and deceptive practices relating to their use of operator services and to ensure that consumers have the opportunity to make informed choices when placing operator service calls.[13]

5. Collect calls involve two parties making choices: the calling party chooses to place a collect call from the particular telephone to the called party, while the called party decides whether to accept the call and thereby incur the charges. It can be argued that the "consumer" in collect calling situations -- that is, the party initiating the call -- is the person at the originating end of the call, who selects the carrier to use for the call. In some cases, the caller may be placing the collect call to his or her own home or office number and may be ultimately responsible for the charges from the chosen carrier. On the other hand, it can be asserted that the collect call is initiated when the called party accepts the charges for the call and, hence, the party paying for the call is the "consumer." In this case, the called party may only wish to accept the charges for calls utilizing particular carriers. Both of these parties make decisions that require informed choices, and each may need protection from unfair and deceptive OSP practices that may have an impact on calling costs and call acceptance. Therefore, we tentatively conclude that both the calling party, who places the call, and the called party, who must accept the charges in order for the message portion of the call to begin, cooperatively initiate the call as consumers and should receive a brand before they commence their portion of the collect call transaction. Accordingly, we propose to amend Section 64.708(d) of the Commission's rules to redefine "consumer" to that effect and invite interested parties to comment on this proposed rule change. We specifically solicit data concerning both the cost of compliance with this proposed rule change and the ratio of collect calls to all operator-assisted calls.[14]

B. Section 64.706 -- Emergency Calls.

6. Section 226(d)(4)(A) of the Act directed the Commission to prescribe regulations establishing minimum standards for OSPs to use in routing and handling emergency telephone calls.[15] In CC Docket No. 90-313, the Commission adopted Section 64.706 of the rules to implement this requirement.[16] This rule states that "[u]pon receipt of any emergency telephone call, a provider of operator services shall immediately connect the call to the appropriate emergency service of the reported location of the emergency, if known, and, if not known, of the originating location of the call.[17] The Commission stated that "[o]ur goal in adopting a minimum standard is to ensure that OSPs receiving emergency calls efficiently route those calls to the appropriate emergency service provider."[18] The Commission added that it was not necessary to prescribe more specific rules delineating the responsibilities of OSPs and that states were free to adopt more stringent requirements.[19] On reconsideration, the Commission clarified that OSPs using automated equipment may route emergency calls to a live operator for handling.[20]

7. As noted above, the TAA amended Section 226(d)(4)(A) of the Act and directed the Commission to establish minimum standards for aggregators, as well as OSPs, to use in routing and handling emergency telephone calls.[21] In light of this amendment, we propose to modify our rules to require that aggregators be subject to the same requirements for routing and handling emergency calls that apply to OSPs. We solicit comment on this proposed rule change and whether the TAA or sound public policy support the adoption of additional requirements in order to ensure the prompt and proper handling of emergency calls from aggregator locations. For example, we seek comment on whether we should require aggregators, such as payphone owners, to program their equipment to recognize emergency dialing sequences and allow consumers to place such calls without charge.

C. Notice of Inquiry: Treatment of Inmate-Only Telephones in Correctional Institutions.

8. In the *Report and Order* in CC Docket No. 90-313,[22] the Commission examined the question of whether correctional institutions providing inmate-only telephones should be excluded from the definition of "aggregator" and, therefore, exempt from the requirements of TOCSIA and the Commission's implementing regulations. The Commission concluded that providing such telephones to inmates presents an "exceptional set of circumstances" that warrant their exclusion from the definition of "aggregators." Accordingly, the Commission ruled that inmate-only telephones would not be subject to the requirements specified by TOCSIA or the implementing rules.[23]

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[12] For example, MCI Telecommunications Corporation recently introduced a collect calling service that is initiated by dialing "1-800-COLLECT." MCI identifies itself to the called party who is asked to accept the charges, but does not brand to the party at the originating end of the call. The American Telephone and Telegraph Company (AT&T) filed an informal complaint regarding this service on June 2, 1993. *See* IC-93-07605.

[13] 47 U.S.C. § 226(d)(1)(A), (B); *see* S. Rep. No. 439, 101st Cong., 2d Sess. 1 (1990)("The purpose of the bill is to protect consumers who make interstate operator services calls from pay telephones, hotels, and other public locations against unreasonably high rates and anticompetitive practices."); *see also* H.R. Rep. No. 213, 101st Cong., 1st Sess. 2 (1989) (The purpose of the bill is "to protect telephone consumers against unfair prices and practices of some operator service providers (OSPs), yet allow the legitimate companies in the industry the opportunity to compete in the market").

[14] The text of the proposed rules is in the Appendix. In addition to the proposed substantive changes discussed in this Notice, we propose to modify the title of Subpart G, Part 64 to reflect the operator service and pay-per-call rules in that subpart.

[15] 47 U.S.C. § 226(d)(4)(A).

[16] 47 C.F.R. § 64.706.

[17] *Id.*; *see Report and Order*, 6 FCC Rcd 2765-67.

[18] *Report and Order*, 6 FCC Rcd at 2767.

[19] *Id.*

[20] *Reconsideration Order*, 7 FCC Rcd at 3886.

[21] 47 U.S.C. § 226(d)(4)(A).

[22] *Report and Order*, 6 FCC Rcd at 2749-52.

[23] *Id.* at 2752.

9. Since release of the *Report and Order*, we have received numerous informal complaints regarding inmate-only telephones, and the matter has been raised by interested members of the public. In addition, staff members have been informed in various discussions that inmates are generally restricted to collect calling and that neither the inmate nor the called party has the option of selecting the entity that handles the call. The complaints frequently object to high rates charged by the presubscribed carrier for the inmate-only telephones.

10. In view of these concerns, we initiate this Notice of Inquiry to invite comment on the changes, if any, that should be made to the rules applicable to inmate-only telephones in correctional institutions.[24] Specifically, we seek comment on the needs of the inmate users; the resources and needs of correctional institutions in providing telephone service for inmates; and whether the goals of Section 226 and the public interest have been met through our current treatment of inmate-only telephones in correctional institutions.[25]

D. Notice of Inquiry: Time Limit for Updating Consumer Information Posting on Aggregator Telephones.

11. Section 226(c)(1)(A) of the Communications Act and Section 64.703(b) of the Commission's rules require that each aggregator post on or near the telephone instrument in plain view of consumers: (1) the name, address, and toll-free telephone number of the provider of operator services; (2) a written disclosure that the rates for all operator-assisted calls are available on request, and that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carriers for information on accessing that carrier's service using that telephone; and (3) the name and address of the Enforcement Division of the Common Carrier Bureau of the Commission, to which the consumer may direct complaints regarding operator services. Neither the statute nor the Commission's rules specifies when this notice must be changed to reflect a change in the presubscribed carrier at the telephone location.

12. The Commission has received reports that some aggregators are not promptly updating this consumer information to reflect a change in the presubscribed OSP. In addition, the New York Consumer Protection Board has requested that the Commission take action to correct this disclosure problem.[26] Therefore, we seek comment on the extent of the problem caused by delays in updating the posted consumer information. We also seek comment on whether a specific time limit for updating the consumer information is necessary or desirable. If so, we invite parties to suggest a reasonable limit.

IV. PROCEDURAL MATTERS

13. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

14. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The Secretary shall send a copy of this Notice of Proposed Rule Making and Notice of Inquiry, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. *See* 5 U.S.C. § 601, *et seq.*

V. CONCLUSION

15. In this Notice of Proposed Rulemaking and Notice of Inquiry, we have outlined our proposals for modifying our operator service rules pertaining to the branding of collect calls and the treatment of emergency calls by aggregators. Further, we have sought comment on whether we should modify our current regulatory treatment of inmate-only telephones in correctional institutions. Finally, we have sought comment on whether the Commission should establish a specific time limit for updating the consumer information that is posted on aggregator telephones when the presubscribed OSP has changed.

VI. ORDERING CLAUSES

16. Accordingly, pursuant to Sections 1, 4(i), 4(j), 201-205, 218, 226, and 303(r) of the Communications Act, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218, 226, 303(r), a NOTICE OF PROPOSED RULE MAKING AND NOTICE OF INQUIRY IS ISSUED, proposing amendment of 47 C.F.R. Section 64.706 and 64.708(d) as set forth in the Appendix.

17. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, all interested parties may file comments on the matters discussed in this Notice and on the proposed rules contained in the Appendix by **March 9, 1995**. Reply comments are due by **March 24, 1995** . All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants wish each Commissioner to have a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commis-

[24] In Policies and Rules Concerning Toll Fraud, CC Doc. No. 93-292: Notice of Proposed Rule Making, 8 FCC Rcd 8618 (1993), the Commission sought comment on measures to address toll fraud problems generally and to establish a federal policy on liability for charges resulting from toll fraud. The Commission now seeks comments from interested parties concerning the risks of toll fraud that might result from changes in our treatment of inmate-only telephones in correctional institutions.

[25] The Commission is currently considering the merits of an automated "billed party preference" routing methodology for 0+ interLATA payphone traffic and for other types of operator-assisted interLATA traffic. Billed Party Preference for 0+ InterLATA Calls, CC Docket No. 92-77: Further Notice of Proposed Rule Making, FCC 94-117 (adopted May 19, 1994).

[26] *See* Letter from Richard M. Kessel, State of New York, State Consumer Protection Board, to William Caton, FCC Acting Secretary, dated April 14, 1994.

sion, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 230) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

PROPOSED RULE CHANGES

It is proposed that Part 64 of Title 47 of the Code of Federal Regulations be amended as follows:

1. The authority citation for Part 64 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended, 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201-4, 218, 225, 226, 227, 48 Stat. 1070, as amended, 1077; 47 U.S.C. §§ 201, 218, 225, 226, 227, unless otherwise noted.

2. The heading of Subpart G is revised to read as follows:

Subpart G - Furnishing of Enhanced Services and Customer-Premises Equipment by Communications Common Carriers; Telephone Operator Services; Pay-Per-Call Services.

3. Section 64.706 is revised to read as follows:

§ 64.706 Minimum standards for the routing and handling of emergency telephone calls.

Upon receipt of any emergency telephone call, providers of operator services and aggregators shall ensure immediate connection of the call to the appropriate emergency service of the reported location of the emergency, if known, and, if not known, of the originating location of the call.

4. Section 64.708 is amended by revising paragraph (d) to read as follows:

§ 64.708 Definitions

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(d) *Consumer* means a person initiating any interstate telephone call using operator services. In collect calling arrangements, both the party on the originating end of the call and the party on the terminating end of the call are consumers under this definition:

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INSIGHT COMMUNICATIONS COMPANY
OF NEW YORK INC.

Petition for Reconsideration

of the Certification of
Isle of Wight County, Virginia,
to Regulate Basic Cable Service Rates
(VA0380)

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 19, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 29, 1993, Insight Communications Company of New York ("Insight") filed a timely petition for reconsideration challenging the certification of Isle of Wight County, Virginia ("Wight") to regulate rates for basic cable service and associated equipment.[1] On August 19, 1994, Insight filed a supplement to its original petition, pursuant to a recent Commission Order.[2] Wight did not file an opposition to Insight's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

3. Insight states that its system serving unincorporated Isle of Wight County, its franchise area, is subject to effective competition because the system serves fewer than 30 percent of the households within its franchise area.[8] Specifically, Insight states that it serves 1,994 subscribers in an area with 7,021 households (that is, occupied housing units)[9] in the unincorporated areas of Wight, or 28.4 percent of the number of households. As supporting documentation, Insight submits a copy of a household trend report prepared by the National Planning Data Corporation which provides a 1992 estimate of 7,021 households in the unincorporated areas of Isle of Wight.[10] In addition, Insight submits a computer print-out with sufficient information to demonstrate that it serves 1,994 subscribers as of October 26, 1993. Insight's supplement also contains 1990 Census household data.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, exists in the

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[1] Isle of Wight filed its Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on October 18, 1993. Its certification became effective on November 17, 1993.

[2] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[3] Communications Act of 1934 § 623 (a)(4), 47 U.S.C. § 543 (a)(4).

[4] 47 CFR § 76.906, 76.910(b)(4).

[5] C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is not subject to effective competition. 47 C.F.R. § 76.910(b). *See* also 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Cable Act (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)) and the Commission's rules (47 C.F.R. § 76.905 (a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the system. Communications Act of 1934, § 623 (l)(1)(A), 47 U.S.C. § 543 (l)(1)(A) and 47 C.F.R. § 76.905 (b)(1).

[9] As the Commission stated recently "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[10] Insight calculated the number of households for the unincorporated areas of Isle of Wight by taking the number of all households in Isle of Wight (9,400) and subtracting the number of households for the incorporated areas of Winsor town (475) and Smithfield town (1,904). All of these figures from the National Planning Data Corporation yielded a household count of 7,021 in the unincorporated areas of Isle of Wight.

[11] 47 C.F.R. § 76.906.

franchise area.[12] We find that Insight has met this burden. Insight appropriately relied on data reflecting the number of households as required by our rules.[13] Relying on this data, Insight has submitted sufficient evidence demonstrating that its cable system serving Isle of Wight County, its franchise area, serves 1,994 of the 7,021 households, or 28.4 percent of the households, within the franchise area. Thus, we find Insight's system serving unincorporated Isle of Wight County is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Insight Communications Company challenging the certification of Isle of Wight County, Virginia, to regulate its basic cable service is GRANTED.

6. IT IS FURTHER ORDERED that the certification granted to Isle of Wight County, Virginia, to regulate Insight Communications Company's basic cable rates IS RESCINDED.

7. This action is being taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[12] 47 C.F.R. § 76.911(b)(1).

[13] Insight's claim is based on estimated 1992 household data. However, reliance on 1990 Census household figures contained in Insight's supplement also yields a penetration level below 30 percent. According to 1990 Census figures there are 9,032 households in Isle of Wight County. This number is reduced by the number of households for Windsor town (425) and Smithfield town (1,904), thus yielding 6,703 households in the unincorporated areas in Wight. A comparison of the number of subscribers (1,194) in relation to the number of households (6,703) yields a penetration level of 29.7 percent.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE TV OF GEORGIA LIMITED PARTNERSHIP

Petition for Reconsideration

of the Certification of
Lumpkin County, Georgia,
to Regulate Basic Cable Service Rates
(GA0603)

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994 Released: December 19, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 1, 1993, Cable TV of Georgia Limited, ("Cable TV of Georgia") filed a timely petition for reconsideration challenging the certification of Lumpkin County, Georgia, ("Lumpkin") to regulate rates for basic cable service and associated equipment.[1] Lumpkin did not file an opposition to Cable TV of Georgia's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[3] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[6]

II. DISCUSSION

3. Cable TV of Georgia argues that its system serving unincorporated Lumpkin County (excluding the incorporated municipality of Dahlonega), its franchise area, is subject to effective competition because the system serves fewer than 30 percent of the households within the franchise area.[7] Cable TV of Georgia states that it serves 1,043 subscribers of the 4,839[8] "households" in the franchise area or 21.55 percent of the total number of "households" in the franchise area. As supporting documentation, Cable TV of Georgia submits a copy of the Bureau of the Census, 1990 Census of Population and Housing Report, CH-1-12, for Lumpkin County and the municipality of Dahlonega. In addition, Cable TV of Georgia provides a "Weekly Subscriber Activity Report" as of October 26, 1993, which indicates that it serves 1,043 subscribers.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[9] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 96.905 of the Commission's rules, is present within the franchise area.[10] Based on all of the evidence presented, we find that Cable TV of Georgia has met this burden.

5. Initially, we note that Cable TV of Georgia based its arguments on incorrect housing data. Cable TV of Georgia's bases its effective competition on "housing units" (occupied and vacant) data. Our rules, however, require the use of data reflecting the number of "households" (*i.e.*, occupied housing units) in the franchise area. *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*).[11] Nonetheless, Cable TV of Georgia's supporting doc-

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[1] Lumpkin filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" on September 23, 1993. Thus, its certification became effective on October 23, 1993.

[2] Communications Act of 1934 § 623 (a)(4), 47 U.S.C. § 543 (a)(4).

[3] 47 CFR § 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The Cable Act (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)) and the Commission's rules (47 C.F.R. § 76.905 (a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the system. Communications Act of 1934, § 623 (l)(1)(A), 47 U.S.C. § 543 (l)(1)(A) and 47 C.F.R. § 76.905 (b)(1).

[8] Cable TV of Georgia explains that its 4,839 figure resulted from the subtraction of the 1990 number of "housing units" for the City of Dahlonega from the total number of "housing units" in Lumpkin County. This yielded 4,839 housing units in the unincorporated areas of Lumpkin County.

[9] 47 C.F.R. § 76.906.

[10] 47 C.F.R. § 76.911(b)(1).

[11] As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend

umentation includes 1990 occupied housing unit Census data. By subtracting the number of occupied housing units for the City of Dahlonega from the total number of housing units for Lumpkin County, it appears that there are 4,199 occupied housing units (or households) in the franchise area.[12] Thus, it appears that Cable TV of Georgia has a penetration of level of 24.8%. Accordingly, its petition is granted.

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Cable TV of Georgia Limited Partnership, challenging the certification of Lumpkin County, Georgia, to regulate its basic cable service IS GRANTED.

7. IT IS FURTHER ORDERED that the certification granted to Lumpkin County, Georgia, to regulate Cable TV of Georgia Limited Partnership's basic cable rates IS RESCINDED.

8. This action is taken pursuant to delegated authority, Section 0.321 of the Commission's Rules, 47 CFR § 0.321.

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Meredith J. Jones
Chief, Cable Services Bureau

"households" to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra.* The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit". Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term reflects only occupied housing units. The term "housing unit", however, is defined by the Census Bureau to include both occupied and vacant housing units.

[12] According to 1990 Census figures, the total number of households in Lumpkin County is 4,976. This number is reduced by the number of households in the City of Dahlonega (777), yielding a total of 4,199 households in unincorporated Lumpkin County.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELE-MEDIA COMPANY OF
SOUTHEAST FLORIDA, INC.

Petition for Reconsideration

of the Certification of
City of Miramar, FL
to Regulate Basic Cable Service Rates
(FL1143)

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 1994; Released: December 20, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 6, 1993, Tele-Media Company of Southeast Florida, Inc. ("Tele-Media") filed a timely petition for reconsideration challenging the certification of the City of Miramar, Florida ("the City") to regulate rates for basic cable service and associated equipment.[1] The City did not file an opposition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6]

II. DISCUSSION

3. Tele-Media argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in the City of Miramar, its franchise area.[7] Specifically, Tele-Media states that it serves 267 of the 1,250 "households" within the City or 21.4 percent of the total number of "households" within the franchise area. Tele-Media asserts that it derived its household data from local census information and marketing data, but does not provide copies of the documentation relied upon or a citation to a verifiable reference source. Moreover, Tele-Media does not indicate how it is usingh the word "households." Pursuant to our rules, households refers to occupied housing units.[8] As supporting documentation, Tele-Media submits a declaration under penalty of perjury from a responsible official certifying the accuracy of the data in the petition. However, such a declaration with regard to information not within the personal knowledge or purview of the declaring party is not, standing alone, sufficient.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[9] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[10] Tele-Media has failed to meet this burden. Tele-Media did not support its effective competition claim with adequate documentation. Our rules require the use of data reflecting the number of households (*i.e.*, occupied housing units) in the franchise area. Although

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[1] Miramar filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 7, 1993. The certification became effective on November 6, 1993.

[2] Communications Act of 1934 § 623(a)(4); 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2); 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 per cent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 § 623(l)(1)(A); 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[8] *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra*. The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term "households" reflects only occupied housing units.

[9] 47 C.F.R. § 76.906.

[10] 47 C.F.R. § 76.911(b)(1).

Tele-Media's petition makes an assertion concerning the number of households in the franchise area, it does not submit sufficient information upon which to determine that its effective competition claim is based on the appropriate factual information required by our rules. Accordingly, Tele-Media's petition is denied.[11]

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Tele-Media of Southeast Florida, Inc. challenging the certification of the City of Miramar, FL to regulate basic cable rates IS DENIED.

6. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

7. IT IS FURTHER ORDERED that Tele-Media of Southeast Florida, Inc. SHALL FILE the required rate justifications on the applicable forms with the City of Miramar, FL within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from the City of Miramar that it is regulating Tele-Media's rates, whichever is later.

8. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

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Chief, Cable Services Bureau

[11] Should Tele-Media wish to submit more specific information sufficient to demonstrate the presence of effective competition, it may submit such information by filing a petition for revocation pursuant to Section 76.914 of the Commission's rules. *See* 47 C.F.R. § 76.914(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cable TV of Greater San Juan
San Juan, Puerto Rico — CUID No. PR0001

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 20, 1994

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the prices Cable TV of Greater San Juan[1] ("Cable San Juan") charges for its cable programming service ("CPS") tiers in the City of San Juan, Puerto Rico (CUID No. PR0001). Rather than attempting to justify its prices through a benchmark or cost of service showing, Cable San Juan responded to the complaints by stating that it has no CPS tier in that system.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. On December 12, 1994, the Cable Services Bureau released an order resolving a letter of inquiry ("LOI") regarding Cable San Juan's system in the City of San Juan.[11] The order addressed the restructured service offerings implemented in this community beginning September 1, 1993, in which Cable San Juan eliminated its CPS tiers and offered instead only a basic service tier and three a la carte channels. The Bureau found that Cable San Juan's restructured service offerings do not constitute a clear evasion of our rate rules. Specifically, Cable San Juan did not avoid rate regulation of most of its previous CPS channels because it moved those channels into a rate-regulated basic tier. With regard to the other three channels, the order permits Cable San Juan to treat its a la carte package as a new product tier that may be priced at market levels under our recently adopted *Going Forward Order*.[12]

DISCUSSION

5. Except in certain limited circumstances,[13] the Commission's authority to regulate cable service rates is limited to the rates charged for CPS tiers.[14] As mentioned above, the Commission's jurisdiction to regulate CPS tiers is triggered by the filing of an FCC Form 329 complaint. Our recent LOI order found that the elimination of Cable San Juan's CPS tiers does not constitute a clear evasion of rate regulation and those channels not placed on the basic

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[1] Cable TV of Greater San Juan is owned by Century-ML Cable Corporation, a subsidiary of a joint venture owned in equal parts by Century Communications Corp. and ML Media, L.P. We note that the provisions of the Communications Act of 1934, as amended, and its implementing regulations apply to cable television providers in Puerto Rico because it is a territory of the United States. *See* 47 U.S.C. §§ 152(a) and 153(g) (1993).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] *See* DA 94-1425.

[12] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) (*"Going Forward Order"*).

[13] Upon the denial or revocation of a franchising authority's certification, the Commission will regulate rates for basic service and associated equipment and installations for a system not subject to effective competition until the franchising authority has obtained certification or recertification. 47 U.S.C. § 543(a)(6); 47 C.F.R. § 76.913(a). In addition, a franchising authority unable to meet certification standards may petition the Commission to regulate rates for basic service and associated equipment and installations, if certain conditions are satisfied. 47 C.F.R. § 76.913(b).

[14] *See* 47 U.S.C. § 543(c)(1).

service tier could be treated as a new product tier under the *Going Forward Order*. Therefore, we need not rule on the FCC Form 329 complaints filed against Cable San Juan in the City of San Juan, Puerto Rico because there was no CPS tier subject to rate regulation pursuant to Section 76.922 of our rules as of September 1, 1993. In addition, nothing in these complaints indicates that Cable San Juan's new product tier violates any of the conditions for establishing that tier outlined in the *Going Forward Order*.[15]

CONCLUSION

6. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the review of Cable San Juan's CPS rates is terminated and all FCC Form 329 complaints pending against Cable San Juan's CPS rates in the City of San Juan, Puerto Rico (CUID No. PR0001) are DISMISSED.

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[15] We have excused one violation, i.e., migrating channels from rate-regulated tiers, in only those situations where, as here, the new product tier is established as an outgrowth of our change in our a la carte policy. *See Going Forward Order* at Para. 51.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Cable TV — CUID No. GA0040
Brunswick, Georgia

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994 Released: December 20, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Century Cable TV ("Century") charges for its cable programming service ("CPS") tiers in the City of Brunswick, Georgia (CUID No. GA0040). Rather than attempting to justify its prices through a benchmark or cost of service showing, Century responded to the complaints by stating that it has no CPS tier in that system.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[1] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[2] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[3] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[4]

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[9]

II. PROCEDURAL MATTERS

4. On December 12, 1994, the Cable Services Bureau released an order resolving letters of inquiry ("LOI") regarding Century's system in the City of Brunswick.[10] The order addressed the restructured service offerings implemented in this franchise area beginning September 1, 1993, in which Century eliminated its CPS tiers and offered instead only a basic service tier and six a la carte channels. The Bureau found that Century's restructured service offerings do not constitute a clear evasion of our rate rules. Specifically, Century did not avoid rate regulation of most of its previous CPS channels because it moved those channels into a rate-regulated basic tier. With regard to the other six channels, the order permits Century to treat its a la carte package as a new product tier that may be priced at market levels under our recently adopted *Going Forward Order*.[11]

III. DISCUSSION

5. Except in certain limited circumstances,[12] the Commission's authority to regulate cable service rates is limited to the rates charged for CPS tiers.[13] As mentioned above, the Commission's jurisdiction to regulate CPS tiers is triggered by the filing of an FCC Form 329 complaint. Our recent LOI order found that the elimination of Century's CPS tiers does not constitute a clear evasion of rate regulation and those channels not placed on the basic service tier could be treated as a new product tier under the *Going Forward Order*. Therefore, we need not rule on the FCC Form 329 complaints filed against Century in the City of Brunswick because there was no CPS tier subject to rate regulation pursuant to Section 76.922 of our rules as of September 1, 1993 in the City of Brunswick. In addition, nothing in those complaints indicates that Century's new product tier violates any of the conditions for establishing that tier outlined in the *Going Forward Order*.[14]

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[2] 47 C.F.R. § 76.956.

[3] 47 C.F.R. § 76.956(b).

[4] *Id.*

[5] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[6] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[7] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[8] *Id.*

[9] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[10] *See* DA 94-1426.

[11] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) (*"Going Forward Order"*).

[12] Upon the denial or revocation of a franchising authority's certification, the Commission will regulate rates for basic service and associated equipment and installations for a system not subject to effective competition until the franchising authority has obtained certification or recertification.47 U.S.C. § 543(a)(6); 47 C.F.R. § 76.913(a). In addition, a franchising authority unable to meet certification standards may petition the Commission to regulate rates for basic service and associated equipment and installations, if certain conditions are satisfied. 47 C.F.R. § 76.913(b).

[13] *See* 47 U.S.C. § 543(c)(1).

[14] We have excused one violation, i.e., migrating channels from rate-regulated tiers, in only those situations where, as here, the new product tier is established as an outgrowth of our change in our a la carte policy. *See Going Forward Order* at Para. 51.

IV. CONCLUSION

6. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the review of Century Cable TV's CPS rates is terminated and all FCC Form 329 complaints pending against Century Cable TV's CPS rates in the City of Brunswick, Georgia (CUID No. GA0040) are DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Application of Mobile Communications Holdings, Inc. for Authority to Construct the ELLIPSO™ Elliptical Orbit Mobile Satellite System	File Nos. 11-DSS-P-91(6) 18-DSS-P-91(18)

ORDER ON RECONSIDERATION

Adopted: December 21, 1994; Released: December 21, 1994

By the Chief, International Bureau:

1. On November 25, 1994, the Bureau, on delegated authority, denied a request for confidentiality filed by Mobile Communications Holdings, Inc. ("MCHI").[1] MCHI had sought confidential treatment, under Section 0.459 of the Commission's rules, of "Exhibit 3" to its application for a license in the "Big LEO" service. By a later letter to the Bureau Chief, however, MCHI narrowed its request from the whole of Exhibit 3 -- over 200 pages long -- to only five letters contained therein. The letters were submitted in connection with the financial qualifications showing in the MCHI application. We ruled that MCHI's request had included only a conclusory showing, insufficient to justify nondisclosure to the public.[2]

2. On December 2, 1994, MCHI filed an Application for Review of the Bureau's decision, in which it yet again narrowed its request -- this time to cover only limited portions of just three of the five letters for which it had previously sought confidential treatment. MCHI submitted redacted copies of these three letters to facilitate public inspection of all but the precise portions which MCHI maintains are confidential.[3] Those specific portions are:

> (a) the portion of a letter from Allister F. Fraser, Vice President, AEC-Able Engineering Co., to Dr. David Castiel of MCHI, which describes the services for which AEC-Able has agreed to arrange financing;
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> (b) the portions of a letter from Milton S. Goldstein, Vice President of Satellite Transmission Systems, Inc., to Mr. Jeff Amerine of Westinghouse Electric Corporation, that describe the part of MCHI's overall satellite development and construction project for which Satellite Transmission Systems and Westinghouse have arranged a deferral of payments; and
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> (c) portions of a letter from David Archer, Executive Director, Spectrum Network Systems, Inc., to Dr. David Castiel of MCHI. This letter outlines an arrangement whereby Spectrum Network Systems may acquire 80% of the exclusive rights to distribute MCHI's satellite service in some regions of the world, unless a third party acquires 60% of those rights, in which case Spectrum has the right to acquire the remaining 40%. MCHI seeks confidentiality for portions of the letter that (1) name that third party, (2) describe the valuation, on a country by country basis, of Spectrum's right to acquire the 40% interest, and (3) describe an agreement for services between Spectrum and MCHI and the number of voting shares Spectrum is to be paid for those services.

3. The International Bureau, of course, has no authority to act on MCHI's Application for Review by the Commission.[4] Nonetheless, we take notice of the fact that MCHI has further narrowed its request for confidentiality. We also take notice that MCHI includes in its Application for Review new arguments that the redacted excerpts from the three letters still in question contain the type of sensitive commercial information that Section 0.459 of our Rules was designed to protect from disclosure, in that its disclosure could result in substantial competitive harm. MCHI notes that the information relating to the pricing of satellite subsystems is proprietary and, if disclosed, could cause substantial harm to the vendor in future negotiations with other purchasers. It also notes that the pricing of distribution rights for certain international markets is also highly sensitive information, and that disclosing such information may adversely affect MCHI's ability to bargain for the sale of distribution rights in other international markets. Finally, MCHI argues that its limited request "balance[s] the public interest in inspection of relevant materials with the equally legitimate interest in ensuring protection of sensitive commercial information which has no bearing on Commission deliberations."[5]

DISCUSSION

4. On our own motion,[6] we hereby reconsider the *Confidentiality Order* for the limited purpose of addressing the information and arguments that MCHI did not include in its first request for confidentiality, and on which the International Bureau was therefore not given any prior opportunity to pass.[7] In doing so, we in no way condone MCHI's decision not to present these arguments in its initial request for confidentiality. We acknowledge, however, that the Bureau's lax treatment of at least some

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[1] *See Order*, DA 94-1322 (November 25, 1994) (the "*Confidentiality Order*").

[2] The *Confidentiality Order* also denied a similar request from Motorola Satellite Communications, Inc., on similar reasoning. Motorola did not seek Commission review and this *Order* does not apply to Motorola's request for confidentiality.

[3] Thus MCHI's entire application, except for the redacted portions of these three letters, has been available for public inspection and comment since December 2, 1994.

[4] *See* 47 U.S.C. § 155(c)(4).

[5] Although, as we have said, the Application for Review is not before us, we also take notice that Loral/QUALCOMM Partnership, L.P. ("LQP"), Constellation Communications, Inc., ("Constellation") and AMSC Subsidiary Corporation ("AMSC") oppose MCHI's Application for Review. MCHI filed a reply to these oppositions on December 16, 1994.

[6] *See* 47 CFR 1.113(a).

[7] *Cf.* 47 C.F.R. § 1.115(c) (applications for review are not to rely on questions of fact or law upon which the Bureau has been afforded no opportunity to pass).

bare-bones requests in the past may have encouraged the submission of requests like MCHI's. To avoid any genuine hardship, we will reconsider to address MCHI's new arguments in this case. We trust, however, that the *Confidentiality Order* makes clear that the Bureau will quickly deny such conclusory or unsubstantiated requests in the future. Where such requests are made and denied by this Bureau in the future, we do not expect to grant reconsideration based on new arguments in Applications for Review. Indeed, a general practice of granting such reconsideration would place the Bureau in the untenable position of being forced to rule on requests for which parties have little incentive to present their best and fullest arguments.

5. Based on its newly advanced arguments, we conclude MCHI has established, by a preponderance of the evidence, that confidential treatment of the material it seeks to redact is warranted. The material is the type of detailed cost and pricing information in which there is a legitimate interest in confidentiality.[8] MCHI has posited a number of mechanisms by which disclosure of the information, especially information concerning individually negotiated prices, could result in competitive harm to it and to its vendor/shareholders. The information submitted by MCHI indicates that its vendors do not disclose the prices for their equipment/services outside a confidential process of negotiations with individual purchasers. Disclosure of this information could result in competitive harm to both MCHI (since it might disadvantage MCHI in negotiations with foreign distributors) and MCHI's vendor/shareholders (since buyers receive a clear competitive advantage if they know the prices that other buyers have been charged as a result of individual negotiations). We therefore believe MCHI has established that the information in question here is entitled to confidentiality under our rules.

6. LQP's original letter opposing the MCHI confidentiality request argued that the Commission could not consider any nonpublic information in the licensing proceeding without violating the Commission's rules against *ex parte* presentations. We reject any suggestion that parties before the Commission are entitled as a matter of right to see even the confidential information submitted by other parties. The very existence of Exemption 4 to the Freedom of Information Act,[9] and the other FOIA exemptions, necessarily implies that government agencies sometimes need to see and act on information that should not be made public. Our own rules on confidential submissions, which are based on FOIA Exemption 4, are to precisely the same effect. Thus, we decline to apply the *ex parte* rules in such a way that they conflict with FOIA, its exemptions, and our rules implementing those exemptions.

7. Our determination that the redactions for which MCHI requests confidentiality are within FOIA Exemption 4 does not preclude us from making a discretionary disclosure if such a disclosure would serve the public interest.[10] We might, for example, permit limited disclosure to the other Big LEO applicants, pursuant to either a nondisclosure agreement or a protective order.[11] The Commission has stated that such disclosures will *not* generally be made "on the mere chance that [the information] might be helpful," but only when "the information is a necessary link in a chain of evidence that will resolve a public interest issue."[12]

8. While the information that MCHI seeks to protect "might be helpful," it falls far short of "necessary" to the other Big LEO applicants' participation in the licensing process, and we therefore decline to authorize discretionary disclosure here. Our rules do not require the type of detailed itemization of costs for which some of the redacted information might be relevant. While some of the material could conceivably bear on MCHI's financial qualifications, we think the likelihood that it would be "necessary" to "resolve" our public-interest determination on the MCHI application is sufficiently slight that MCHI's FOIA-authorized interest in confidentiality should prevail here.

9. Some may argue that even limited disclosure is better than none at all, and this argument has merit in any particular case. But we cannot ignore the fact that overuse of such limited disclosure may, in the long run, induce decisionmakers to grant confidentiality *more* frequently (subject to limited disclosure), rather than (a) deny the confidentiality altogether and risk litigation with the submitting party, or (b) grant confidentiality altogether and risk litigation with other interested parties. The effect of such overuse would be disclosure for everyone *except* the public, a result that is inconsistent with the Supreme Court's admonition that Congress "'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest.'"[13] In addition, we note that a limited disclosure in this proceeding would have "ripple effects" even in this particular case specifically, it would require any party commenting on the partially disclosed information to file all or some of its comments in a manner that prevented public disclosure of the confidential information -- and therefore of the comments themselves. Such a withdrawal of even more information from the public domain would, in our view, be contrary to FOIA's pro-disclosure purpose. Finally, we are aware of no argument that public disclosure would, in this case, present any more danger of competitive injury than disclosure to the other Big LEO applicants.

10. Accordingly, IT IS ORDERED that MCHI's Request for Confidentiality is GRANTED as to the excerpts described in MCHI's Application for Review filed December 2, 1994.

11. IT IS FURTHER ORDERED that all other portions of MCHI's application for a Big LEO license are available for public inspection.

12. IT IS FURTHER ORDERED that this Order be effective upon its adoption on December 21, 1994.

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[8] *Cf. Allnet Communications v. FCC*, 800 F. Supp. 984 (D.D.C. 1992), *aff'd*, No. 92-5351 (D.C. Cir. May 27, 1994).

[9] 5 U.S.C. § 552(b)(4).

[10] *Chrysler v. Brown*, 441 U.S. 281, 290-94 (1979). *See* 47 C.F.R. § 0.461(f)(4); *Commission Requirements for Cost Support Materials to be Filed with Open Network Architecture Access Tariffs*, 7 F.C.C. Rcd. 1526, 1531 (CCB 1992).

[11] MCHI made no offer of limited disclosure in its original request for confidentiality. The November 18 letter in which MCHI narrowed its request to five letters suggested limited disclosure of these letters to the other Big LEO applicants, subject to a nondisclosure agreement drafted by MCHI.

[12] *Classical Radio for Connecticut, Inc.*, 69 F.C.C.2d 1517, 1520 n.4 (1978).

[13] United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 771 (1989) (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149(1975)).

13. As required by Section 0.459(d) of the Commission's Rules, a copy of this ruling has been forwarded to the Commission's Office of General Counsel.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HORIZON CABLE I LIMITED PARTNERSHIP

Petition for Reconsideration

of the Certification of
Vevay Township, MI
to Regulate Basic Cable Service Rates
FCC Community ID No. (MI0614)

MEMORANDUM OPINION AND ORDER

Adopted: December 27, 1994; Released: December 28, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 15, 1993, Horizon Cable I Limited Partnership ("Horizon") filed a timely petition for reconsideration challenging the certification of Vevay Township, Michigan ("Vevay") to regulate rates for basic cable service and associated equipment.[1] In addition, Horizon submitted a supplement to its petition containing supporting documentation pursuant to a recent Commission Order.[2] Horizon later filed a second supplement. Vevay did not file an opposition to Horizon spetition to reconsideration.[3]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[4] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[5] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[7] Regulation of rates is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[8]

II. DISCUSSION

3. Horizon states that its cable system is subject to effective competition because it has less than 30 per cent penetration in Vevay Township, its franchise area.[9] Horizon, in its most recent supplement, claims that it serves only 307 of the 1,231 "occupied housing units" in its franchise area, or 24.9 percent of the total number of "occupied housing units". As supporting documentation, Horizon submits a copy of the relevant page from the 1990 Census data[10] which indicates that there are 1,231 occupied housing units[11] in Vevay Township. In addition, Horizon submits a copy of a computer printout which indicates that it serves 307 subscribers in Vevay Township.

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[1] Vevay filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition ("FCC Form 328") on September 30, 1993. The certification became effective on October 30, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) ("*Effective Competition Order*").

[3] Vevay did not file an opposition to Horizon's petition for reconsideration. However, in a cable programming service rate review proceeding before the Commission, Vevay filed an opposition to a motion made by Horizon to dismiss Vevay's cable programming service rate complaint on the grounds that effective competition exists in the franchise area. *See* Cable Programming Service Rate Complaint Form (FCC Form 329) filed on December 6, 1993; Horizon Motion to Dismiss filed November 15, 1993; Vevay Objection to Motion to Dismiss filed December 10, 1993; Horizon Reply to Motion to Dismiss dated December 22, 1993. In its opposition to the motion to dismiss, Vevay addresses Horizon's effective competition arguments. Because the effective competition issues in the two proceedings are the same, we will consider Vevay's arguments on the effective competition issue in the context of this reconsideration proceeding.

[4] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4)

[5] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[6] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[7] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[8] 47 C.F.R. § 76.911(c).

[9] The Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 per cent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. §543(1)(1)(A); 47 C.F.R. § 76.905 (b)(1).

[10] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra*.

[11] As the Commission stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) ("*Third Recon Order*). The count of "households" in the 1990 Census reflects only occupied housing units. See Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B, at B-8.

4. In its opposition, Vevay argues that Horizon has made an affirmative decision to limit its actual service area, despite the fact that its franchise agreement does not restrict service to a specific area of the Township.[12] It argues that Horizon's current area radiates out of the City of Mason along select roads to serve "population nodes," but does not extend into less developed areas. This "redefined area" has a total of 697 households of which 307, or 44 percent, subscribe to Horizon's cable system. As supporting documentation, Vevay submits a map illustrating Horizon's actual service area in relation to its authorized area of service.

5. In reply, Horizon argues that it has not affirmatively redefined its franchise area. It argues that the terms of its franchise agreement with Vevay require it to expand into unserved areas of the township when the population density reaches a level of 60 households per cable mile. It argues that it is in full compliance with the franchise agreement. Horizon also argues that it plans to expand its service by approximately 35 percent during the next year. Finally, Horizon argues that the mere presence of unserved areas of a franchise area, by itself, is not sufficient evidence that a cable operator has redefined its franchise area.

6. As a preliminary matter, we are unpersuaded that the relevant franchise area for purposes of determining the presence of effective competition in this case is some area other than the entire Vevay Township. Vevay merely argues that because Horizon does not serve its entire franchise area, it has chosen to redefiine its franchise area. However, as the Commission has stated previously, "[t]he fact that a franchise area has not as yet been filled out by construction of a system would not by itself be taken as redefining the service area."[13] Accordingly, we find that Vevay has not demonstrated that Horizon has made an affirmative decision to redefine its franchise area.

7. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[14] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, exists in the franchise area.[15] Horizon has met this burden. Horizon appropriately relied on data reflecting the number of households as required by our rules.[16] Relying on this data, Horizon has submitted evidence demonstrating that its cable system serving Vevay Township, its franchise area, serves 307 of the 1,231 occupied housing units, or 24.9 per cent of the households in its franchise area. Thus, we find that Horizon's system serving Vevay Township is subject to effective competition. Accordingly, Horizon's petition is granted.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Horizon Cable 1 Limited Partnership challenging the certification of Vevay Township, MI to regulate basic cable rates IS GRANTED.

9. IT IS FURTHER ORDERED that the certification of Vevay Township, MI to regulate Horizon Cable's basic cable service rates IS RESCINDED.

10. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[12] In its *First Order on Reconsideration* the Commission clarified its definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (1993) (*"First Recon. Order"*). Generally, "|a| franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[13] *First Recon. Order, supra.*

[14] 47 C.F.R. §76.906.

[15] 47 C.F.R. §76.911(b).

[16] *Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NewChannels Corporation Syracuse, New York	CUID Nos. NY0031, NY0033, NY0323, NY0528, NY0529, NY0725 and NY0810

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1994; Released: December 30, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price NewChannels Corporation ("NewChannels") was charging for its cable programming service ("CPS") tier in CUID Nos. NY0031, NY0033, NY0323, NY0528, NY0529, NY0725 and NY0810. NewChannels has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of NewChannels's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first CPS complaint was completed and served on NewChannels on December 23, 1993.[11] The Commission received the complaint on December 30, 1993.

5. NewChannels attempted to justify its CPS price through FCC Form 393's filed on February 14, 1994 for CUID Nos. NY0033, NY0528, NY0725 and NY0810, February 15, 1994 for CUID No. NY0031 and NY0529, February 16, 1994 for CUID No. NY0323. NewChannels amended its justification on July 5, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

III. DISCUSSION

6. NewChannels asserts that its monthly CPS tier price of $10.18 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $10.18 as calculated in the filing. Upon review of NewChannels's Form 393, we have found no apparent errors that would require a recalculation of NewChannels's maximum permitted CPS price.

IV. CONCLUSION

7. Upon review of the record herein, we conclude that NewChannels has demonstrated that $10.18 per month (plus franchise fee) was the maximum reasonable CPS tier price for the period December 30, 1993 to May 14, 1994.[13]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent NewChannels has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration*, n.7 *infra*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which NewChannels implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*) ; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] The complaint was dated December 21, 1993 and states that it was mailed to NewChannels on December 23, 1993. NewChannels has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider December 23, 1993 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein. This finding is based solely on the representations of

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints against the cable programming service price charged by NewChannels Corporation, CUID Nos. NY0031, NY0033, NY0323, NY0528, NY0529, NY0725 and NY0810, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by NewChannels Corporation with respect to CUID Nos. NY0031, NY0033, NY0323, NY0528, NY0529, NY0725 and NY0810, for the period of December 30, 1993 to May 14, 1994, justifies a maximum price of $10.18 per month (plus franchise fee) for NewChannels Corporation's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

NewChannels listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COLONY	Chelmsford, MA
CABLEVISION OF	Dartmouth, MA
SOUTHEASTERN	Fall River, MA
MASSACHUSETTS, INC.	Lowell, MA
AND	New Bedford, MA
LOWELL CABLE	Tewksbury, MA
TELEVISION, INC.	

Appeals of Local Rate Orders of the
Massachusetts Community Antenna
Television Commission

Requests for Stay
of Local Rate Orders of the
Massachusetts Community Antenna
Television Commission

CONSOLIDATED ORDER

Adopted: December 22, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Colony Cablevision of Southeastern Massachusetts, Inc. and Lowell Cable Television, Inc., wholly-owned subsidiaries of Colony Communications, Inc. (collectively "Colony"), filed on June 22, 1994 six appeals of local rate orders adopted May 20, 1994 by the Massachusetts Community Antenna Television Commission ("CATC") for the communities of Chelmsford, MA.; Dartmouth, MA.; Fall River, MA.; Lowell, MA.; New Bedford, MA.; and Tewksbury, MA. ("Communities").[1] On June 22, 1994, Colony also filed six Requests for Stays of the CATC's local rate orders.[2] The six appeals filed by Colony of the local rate orders for the Communities are identical in all material respects. In the interest of administrative efficiency, the Commission has decided that each of the proceedings is sufficiently related to one another to justify the resolution of all six of the appeals in this Consolidated Order.

2. In its local rate orders, the CATC established regulated rates for Colony's basic cable service, associated equipment and installation charges,[3] pursuant to the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[4]

3. Colony challenges those portions of the CATC's local rate orders which (a) disallow portions of Colony's claimed direct and indirect labor costs of providing, installing and maintaining customer equipment; (b) order refunds for all installation and equipment charges since September 1, 1993 in excess of the rates the CATC found to be reasonable; and (c) prohibit Colony from identifying a cable programming service tier with the single word "Basic."

II. STANDARD OF REVIEW

4. Under the Commission's rules, appeals of franchising authorities' local rate orders are reviewed by the Commission.[5] In ruling on an appeal of a local rate order, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering a local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision, but instead it will remand the issue to the franchising authority with instructions for its resolution.[8] The three issues under consideration in the instant appeal are discussed in the ensuing section of the Order.

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[1] On June 30, 1994, the CATC filed a Motion for Extension of Time, in which it sought an extension until August 1, 1994 for the submission of its Opposition to Colony's Appeals. The Commission granted the CATC's Motion on July 5, 1994. The CATC then filed a Consolidated Opposition to Colony's Appeals ("Opposition") on July 29, 1994. Colony filed a Consolidated Reply to the CATC's Opposition on August 11, 1994.

[2] The CATC filed a consolidated Opposition to Colony's Requests for Stay on July 1, 1994. As discussed in paragraph 16, *infra*, these Requests for Stay are dismissed as moot in light of the decision on the merits herein.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment, and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[4] As part of the rate review process, Colony submitted an FCC Form 393 ("Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment") for each of the Communities to the CATC. Local franchising authorities review the information contained in the FCC Form 393, or its successor forms, in order to determine cable operators' maximum permitted rates for basic service, associated equipment, and installations under the Commission's rate regulations. *See Report and Order and Further Notice of Proposed Rulemaking* in MM Docket 92-266, 8 FCC Rcd 5631, 5770 (rel. May 3, 1993) (*"Rate Order"*).

[5] 47 C.F.R. §76.944.

[6] *Rate Order* at ¶ 149; *Third Order on Reconsideration* in MM Docket 92-266, 9 FCC Rcd 4316, 4346 (rel. March 30, 1994) (*"Third Order on Reconsideration"*). As part of its appeal, Colony has alleged that the CATC has failed to demonstrate that Colony's rates were unreasonable. Pursuant to §76.937 of the Commission's rules, cable operators bear the burden of proving that their existing or proposed rates for basic service and associated equipment are in compliance with the Commission's regulations. Therefore, Colony's assertion that the CATC failed to demonstrate that Colony's rates were unreasonable is an erroneous statement of who bears the burden of proof.

[7] *Id.*

[8] *Id.*

III. DISCUSSION

A. Equipment Basket

5. The first issue raised by Colony involves the correct calculation of equipment costs to be included in Colony's FCC Form 393. FCC Form 393 is the official form used by cable operators to justify that their regulated rates for programming, equipment and installations comply with the Commission's rules. FCC Form 393 is divided into three separate, but interrelated, parts. In Part II, the operator calculates its permitted programming rates, while in Part III, the operator calculates its permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the time period under review.

6. The operator's maximum permitted rates are derived by completing Parts II and III of FCC Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation, or as of September 30, 1992 if the operator's current per channel rate exceeds its benchmark per channel rate. After calculating actual aggregate revenues, the operator converts those revenues to a per channel rate, and then compares the per channel figures to the applicable benchmark rate. If the per channel rate exceeds the benchmark rate, the operator must reduce the per channel rate to the benchmark rate or by 10%, whichever reduction amount is less. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of FCC Form 393.

7. Colony claims that the CATC's local rate orders unjustifiably exclude portions of Colony's direct and indirect labor costs of providing, installing and maintaining customer equipment by disallowing (a) the costs associated with the time spent by Colony employees on the telephone responding to subscribers' inquiries about equipment and diagnosing equipment trouble reports; and (b) the labor costs associated with the time spent by Colony employees on the administrative tasks of handling and processing subscriber complaints regarding equipment and service.

8. At a prehearing conference, the CATC requested that Colony provide detailed information regarding the components of its converter and remote repair hours on Steps C and D of FCC Form 393. After reviewing the information that Colony submitted in response to its request, the CATC allowed Colony to include the time spent by Colony employees on "initial maintenance" of customer equipment, as well as "service call" time in those situations in which a Colony technician must remove equipment from a subscriber's home. The CATC excluded that time spent by Colony employees (a) talking to customers on the telephone; and (b) handling administrative tasks related to the maintenance of customer equipment. The CATC then removed the salary and benefit costs associated with the excluded hours. The CATC maintains that it acted reasonably in disallowing the costs in question because the corresponding time spent by Colony employees on the telephone with subscribers, and on the processing and handling of subscribers' equipment and installation inquiries, did not directly affect the performance of subscriber equipment or prolong its life.[9] The CATC concluded that the removed hours were "general administrative time that is not includable [in Colony's Equipment Basket] under the FCC's regulations."[10]

9. Colony asserts that these excluded costs result in an unwarranted reduction in its monthly rates for remotes and converters, as well as a lowered percentage of annual maintenance and installation costs attributable to customer equipment and installation, which produces an artificially depressed Hourly Service Charge ("HSC"). The HSC, in turn, affects Colony's installation charge and its charges for changing service tiers or equipment. It is Colony's position that the CATC's total disallowance of its equipment costs arising from time spent on the telephone with subscribers, and on the processing and handling of subscribers' equipment and installation inquiries, is presumptively unreasonable. Alternatively, Colony argues that the excluded activities performed by Colony employees do directly affect the use of subscriber equipment, and the costs at issue are specifically related to the maintenance and repair of remotes and converters. Thus, Colony asks that the Commission reverse the CATC's local rate orders and remand them to the CATC with instructions to allow Colony to include the disputed costs in its Equipment Basket.

10. Under the Commission's rules, Equipment Basket costs are limited to the direct and indirect material and labor costs of providing, leasing, installing, repairing and servicing customer equipment.[11] The Equipment Basket does not include general administrative overhead.[12] By its own admission, the CATC interpreted this provision of the Commission's rules "narrowly."[13] Unfortunately, the CATC's interpretation was too narrow. Generally, the Commission prefers to leave regulation of the basic service tier to the sound discretion of certified local franchising authorities.[14] However, in this instance, the CATC has excluded certain costs from Colony's Equipment Basket that are legitimate indirect labor costs related to the maintenance and repair of remotes and converters. The CATC included only those costs related to activities performed by Colony employees that directly affected the performance of subscriber equipment or prolonged its life.[15] However, the Commission's regulations are clear that direct and indirect labor costs of providing, leasing, installing, repairing and servicing customer equipment may be included in an operator's Equipment Basket. Accordingly, we remand this portion of the local rate orders to the CATC with instructions to allow Colony to include in its Equipment Basket those direct and indirect labor costs that relate to the provision, leasing, installation, repair, or service of customer equipment. For example, all of the labor costs of a telephone operator should not be included in Colony's Equipment Basket just because a portion of the operator's duties in-

[9] Colony notes, however, that because the CATC articulated this standard for the first time in its Opposition, Colony was denied the opportunity to meaningfully address this issue.
[10] *See* Local Rate Orders, at p. 11.
[11] 47 C.F.R. §76.923(c).
[12] *Id.*
[13] *See* Opposition, at p. 8.
[14] *See TCI Cablevision of St. Louis, Inc.*, DA 94-424 (rel. April 29, 1994).
[15] *See* paragraph 8, *supra*.

volve answering equipment complaint calls from subscribers. However, Colony should be allowed to incorporate in its Equipment Basket that portion of a telephone operator's time that is spent responding to such calls. It remains within the discretion of the CATC to determine which of Colony's previously excluded costs are includable in its Equipment Basket under the Commission's regulations and which of Colony's previously excluded costs should continue to be excluded because they do not bear even an indirect relation to the provision, leasing, installation, repair, or service of customer equipment.

B. Refund Order

11. Colony also claims that the CATC violated the Commission's rules by ordering Colony to refund equipment and installation overcharges without providing Colony with notice and an opportunity to comment prior to the issuance of the refund order. Colony states that while the CATC solicited information from Colony on several occasions, the CATC declined to inform Colony of the possibility that it would issue a refund order or the basis and size of such a refund order. Colony asks that the refund order be reversed and remanded to the CATC. The CATC contends that Colony was afforded reasonable notice and an opportunity to comment on the possibility of a refund order, including at least two face-to-face meetings with the CATC's staff.

12. Under the Commission's rules, a franchising authority must give a cable operator notice and an opportunity to comment before ordering the operator to refund previously paid rates to subscribers.[16] By the very nature of the rate review conducted by the CATC, Colony had effective notice that a refund order might be issued by the CATC. Although Colony claims that the CATC did not inform it of the possibility of a refund order, or the basis and size of such a refund order, the record indicates that, in addition to any informal contacts which might have taken place between Colony and the CATC, representatives of the CATC and Colony met on at least two occasions prior to the release of the CATC's local rate orders.[17] Representatives of Colony and the CATC attended both a prehearing conference at the CATC's offices in Boston on January 28, 1994 and the ensuing public hearing on March 7, 1994.[18] Colony, through its participation in the local regulatory process, had sufficient notice and opportunity to inquire about and comment on the likelihood and scope of such a refund order. Therefore, we find that Colony was afforded adequate notice and opportunity to comment by the CATC.

C. Identification of Cable Programming Service Tier

13. Colony has changed the name of its basic service tier, which was formerly known as "Basic," to "Lifeline." In addition, Colony has changed the name of its cable programming service tier, which was formerly known as "Basic Plus," to "Basic." In its local rate orders, the CATC prohibited Colony from continuing to use the word "Basic" by itself to identify what is in fact a cable programming service tier. Colony claims that this prohibition unreasonably dictates the nomenclature that it must use to denote its two tiers of regulated service. Colony further contends that the CATC's prohibition of using the word "Basic" to identify a cable programming service tier violates its First Amendment rights by unduly restricting its ability to engage in protected commercial speech. The CATC states that while the use of the word "Basic" in combination with additional words such as "Expanded" or "Plus" is not objectionable, Colony's practice of using the single word "Basic" to identify a cable programming service tier is a violation of the CATC's customer service rules requiring (a) that cable operators fully disclose all of their programming services and rates to each of their subscribers;[19] and (b) that cable bills contain clear, concise and understandable language.[20]

14. Under the Commission's rules, appeals of local franchising authorities' ratemaking decisions that do not turn on whether a franchising authority has acted consistently with the 1992 Cable Act, or the Commission's rules regarding rate regulation, "may be heard in state or local courts."[21] This portion of Colony's appeal does not depend upon whether the CATC has acted in conformity with the 1992 Cable Act or the Commission's rules since the CATC relied upon its own customer service rules in rendering its decision to prohibit Colony from using the word "Basic" to identify a cable programming service tier. Because the issues presented in this portion of Colony's appeal involve state, rather than federal, customer service regulations, this portion of Colony's appeal should be taken up in a state or local forum of appropriate jurisdiction, rather than with the Commission.[22] This portion of Colony's appeal is therefore denied.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, that the Appeals filed by Colony Cablevision of Southeastern Massachusetts, Inc. and Lowell Cable Television, Inc. are REMANDED IN PART and DENIED IN PART.

16. IT IS FURTHER ORDERED that, in light of the resolution of their Appeals, the six Requests for Stay filed by Colony Cablevision of Southeastern Massachusetts, Inc. and Lowell Cable Television, Inc. ARE DISMISSED as moot.

17. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

16 47 C.F.R. §76.942(a).
17 *See* Local Rate Orders, at p. 2-3.
18 *Id.*
19 *See* 207 CMR §10.02(1).
20 *See* 207 CMR §10.04(1).
21 47 C.F.R. §76.944(a).
22 As a consequence of our ruling here, we need not address Colony's First Amendment claim.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-16

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Leone, American Samoa)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 25, 1995; Released: February 10, 1995

Comment Date: April 3, 1995
Reply Comment Date: April 18, 1995

By the Chief, Allocations Branch:

1. The Commission, on its own motion, proposes to delete Channel 266C1 from Leone, American Samoa. The independent nation of Western Samoa has recently assigned an FM station to operate on Channel 266A which conflicts with the Leone allotment.

Technical Summary

2. Channel 266C1 at Leone is presently vacant and unapplied for. However, should there be an interest in applying for a Class C1 channel at Leone, the staff has determined that Channel 230C1 is available for allotment. Channel 230C1 can be allotted to Leone in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

Option I

City	Channel No. Present	Proposed
Leone, American Samoa	266C1	--

Option II

Leone, American Samoa	266C1	230C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 3, 1995**, and reply comments on or before **April 18, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 230C1 at Leone are -14-20-38 South Latitude and 170-47-06 West Longitude.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cox Cable Communications, Inc. and Times Mirror Company -- Transfer of Control and Petition for Special Relief

File Nos. CAR-44842-10 *et al.* and CSR-4375

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On August 3, 1994, Cox Cable Communications, Inc. ("Cox Cable") filed applications for authority to transfer, pursuant to section 310(d) of the Communications Act,[1] licenses in the Cable Television Relay Service ("CARS") from the Times Mirror Company ("Times Mirror") to Cox Cable. Cox Cable is applying for these license transfers as part of its proposed merger of the Cox Cable and the Times Mirror cable television systems.

2. In addition, on September 21, 1994, Cox Cable filed a Petition for Special Relief requesting a temporary waiver of Section 76.501(a) of the Commission's Rules and Section 613(a)(1) of the Communications Act, which prohibit a cable operator from owning a television broadcast station whose Grade B contour covers any portion of the community served by the operator's cable system. Cox Cable filed this petition to permit Cox Cable 18 months to sell certain Times Mirror cable television systems that are located in the same Grade B contour as broadcast television stations indirectly controlled by Cox Cable's corporate parent, Cox Cable Enterprises, Inc. (CEI).

3. Absent approval of Cox Cable's license transfer applications, which will facilitate consummation of the transaction, it would be unnecessary to reach the Request for Special Relief. As explained below, the Bureau finds that Cox Cable has demonstrated that grant of its proposed license transfer applications would serve the public interest. As such, the Bureau considered Cox Cable's waiver request, and found that grant of this request would likewise serve the public interest. Therefore, both the transfer applications and petition for special relief will be granted.

II. BACKGROUND

4. Cox Cable is a cable television multiple system operator (MSO) which owns and operates 21 cable systems in 18 states. As of June 30, 1994, such cable systems provided service to approximately 1.9 million customers and passed approximately 2.9 million homes.[2] Cox Cable's largest systems are located in San Diego, California; New Orleans, Louisiana; Hampton Roads, Virginia; Omaha, Nebraska; and Spokane, Washington. In addition, Cox Cable has a 50% ownership interest in two additional cable systems in Fort Walton Beach, Florida and Staten Island, New York which provide service to approximately 148,419 customers and pass approximately 220,000 homes. As of March 31, 1994, Cox Cable states that it averages approximately 86,000 basic customers per system, with 20 of its 21 cable systems serving more than 30,000 customers, as compared to the industry average of approximately 5,000 subscribers per system.[3] Cox Cable also has investments in several different programming services, including *The Discovery Channel, The Learning Channel, E! Entertainment Television, The Sunshine Network, Viewer's Choice* and *Music Choice*.[4]

5. Cox Cable also states that it owns a 10.43% interest in PrimeStar Partners, L.P ("PrimeStar"), an operator of a medium-powered, Ku-band direct-to-home satellite service.[5] Cox Cable states that PrimeStar currently serves approximately 70,000 customers, and that it understands that PrimeStar estimates that the potential market for DBS service to be 12 to 15 million households, including 10 to 11 million households that currently are not passed by cable. Cox Cable states that it anticipates making additional investments in PrimeStar in an aggregate amount of approximately $30 million through 1998.[6]

6. Times Mirror is an MSO that currently owns and operates 61 cable systems in four geographic regions, including Phoenix, Arizona, Southern California, Rhode Island, and a self-described "Eastern Region." As of June 30, 1994, these systems, which are operated under the Dimension Cable name, served approximately 1.2 million basic subscribers in 13 states and passed approximately 2.1 million homes.[7] The Southern California Region consists of three clusters of systems representing 33 franchises serving Palos Verdes, Orange County, and North San Diego, California. The Phoenix Region consists of three clusters of systems representing 19 franchises serving the Phoenix metropolitan area, Casa Grande, and Bullhead City, Arizona. The Rhode Island Region consists of two franchises covering Providence and seven other towns including North Providence, East Greenwich, West Warwick, and Coventry,

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[1] 47 U.S.C. § 310(d).

[2] Cox Cable Communications, Inc. *Form S-4* at 151 (October 20, 1994) ("S-4").

[3] S-4 at 151.

[4] S-4 at 167-170.

[5] *Id.* at 172. PrimeStar is commonly referred to as a medium-powered Direct Broadcast Satellite ("DBS") service, although it operates in the Fixed Satellite Service ("FSS"). *See Implementation of Section 19 of the 1992 Cable Act -- Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report*, ¶ 61 (FCC 94-235, 1994) ("1994 Competition Report"). PrimeStar Partners, L.P. was formed in 1990 by GE Americom and nine of the nation's largest cable television companies. Cable Satellite Inc., a wholly-owned subsidiary of Cox Cable, owns a 10.43% interest in PrimeStar. PrimeStar's other partners include TeleCommunications, Inc., Time Warner, Comcast and Continental. S-4 at 172.

[6] *Id.*

[7] S-4 at 136.

Rhode Island, and Weymouth, Massachusetts. Finally, the "Eastern" Region consists of twelve clusters of systems representing 153 franchises headquartered in Ashland, Kentucky; Coshocton, Defiance, and Newark, Ohio; Lafayette, Indiana; Springfield, Illinois; Midland and Texarkana, Texas; Williamsport and Washington, Pennsylvania; Meridian, Connecticut; and Amherst, Massachusetts.[8] Times Mirror's programming interests include investments in *Music Choice* (a digital audio service), the *TV Food Network* (a food and related programming service) and *Viewer's Choice* (a pay-per-view movie service).[9]

7. Cox Cable states that its acquisition of Times Mirror's cable television assets will be accomplished through a multi-stage transaction pursuant to the terms of an Agreement and Plan of Merger among Times Mirror, New TMC (a wholly-owned subsidiary of Times Mirror), Cox Cable and CEI.[10] First, Times Mirror will contribute to New TMC all of Times Mirror's non-cable television businesses, including the cash proceeds from approximately $1.364 billion of debt that Times Mirror will incur immediately prior to the contribution. New TMC will assume all of Times Mirror's liabilities except (a) those related to the cable television business and (b) the obligation to repay the $1.364 billion of debt referred to above. Once this stage of the transaction is completed, Times Mirror's assets will consist of (a) its cable television businesses (owned directly through Times Mirror Cable Television, Inc. (TMCT)) and (b) the outstanding stock of New TMC.[11]

8. In the final steps of the transaction, Times Mirror will merge with and into Cox Cable, Times Mirror will cease to exist, and Cox Cable will be the surviving corporation. In the merger, each share of Times Mirror common stock will be converted to a share of New TMC common stock and shares of Cox Cable common stock. Each share of New TMC common stock owned by Times Mirror will be canceled in the merger. As a result, following the merger, New TMC will own all of Times Mirror's non-cable television assets, and Cox Cable will own TMCT directly and therefore will own all of Times Mirror's cable television assets. After the merger, Cox Cable anticipates performing an internal restructuring which would result in the dissolution of Times Mirror and assets now owned by Times Mirror will be owned directly by Cox Cable.[12]

9. Following consummation of the merger, Cox Cable will become the fourth largest operator of cable systems in the United States. Cox Cable will own and operate 82 cable television systems in 20 states, serving approximately three million customers, approximately 5.35% of subscribers nationwide.[13] This represents more than a 68% increase in Cox Cable's customers.[14] In addition, the merger will increase Cox Cable's customer base by 50% or more in each of the Southern California, Southwest, New England and Midwest regions. In particular, post-merger, Cox Cable will have more than 750,000 customers in the Southern California Region and approximately 360,000 customers in the Phoenix region.[15]

III. THE PROPOSED LICENSEA TRANFERS

A. Applicant's Submissions

10. Cox Cable's applications were placed on public notice on August 31, 1994. No comments or petitions to deny were filed.

11. The Commission sent Cox Cable a letter dated September 12, 1994, requesting additional information in support of its license transfer applications, including the following: (1) a background statement describing the parties to the merger; (2) a description and a chronology of the proposed transaction; (3) a demonstration that the proposed transaction serves the public interest, convenience and necessity; and (4) a statement of the competitive effects and efficiencies of the proposed merger.

12. In response, Cox Cable makes several arguments in support of its contention that the proposed transfers are in the public interest. First, Cox Cable argues that the Commission should approve the transfers because the proposed merger would not violate the Commission's horizontal ownership rules, which, in general, prohibit a person from owning cable systems passing more than 30 percent of the homes in the United States.[16] Cox Cable states that it passes 2.8 million homes and that Times Mirror passes 2 million homes. Combined, these cable systems will pass about 5.3 percent of all homes passed by cable systems in the United States,[17] significantly less than the 30 percent limit.[18]

13. Second, Cox Cable suggests that the proposed merger will not have an anticompetitive effect because the merger will not eliminate competition between Cox Cable and Times Mirror, as they do not compete in any geographic area.[19] Although Cox Cable states there is no competition between the two merging entities, it asserts that its cable systems compete with other communications and entertainment media, including conventional television broadcast stations, newspapers, movie theaters, live sporting events and home video products.[20] Cox Cable also argues that direct broadcast satellite (DBS) is also providing additional competition via DirecTV, United Satellite Broadcasting Company, Inc. ("USSB") and PrimeStar.[21] With respect to PrimeStar, Cox Cable states that post-merger, PrimeStar will continue to compete with the Cox Cable systems for subscribers. Cox Cable states further that its PrimeStar distribution rights are non-exclusive within its franchise service areas and areas contiguous thereto. Cox Cable also

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[8] S-4 at 137.
[9] S-4 at 139-40.
[10] Form S-4, Annex IV.
[11] October 11, 1994 Submission of Cox Cable at 2-3 ("October 11 Submission").
[12] *Id.* at 3.
[13] 1994 Competition Report, Appendix G, Table 1A.
[14] S-4 at 160.
[15] *Id.* at 162.
[16] *See* 47 C.F.R. § 76.503; *Second Report and Order, Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 -- Horizontal and Vertical Ownership Limits*, 8 FCC Rcd 8565 (1993) ("*Second Report and Order*"). Ownership of cable systems that pass up to 35% of all homes passed nationwide is permitted so long as the systems beyond the 30% limit are minority-controlled. 47 C.F.R. § 76.503(b). The Commission has temporarily stayed enforcement of its horizontal ownership rules. *Second Report and Order* at ¶ 109.
[17] As of April 1994, cable systems passed approximately 91 million homes in the United States. *See* NCTA Cable Television Developments (April 1994) at 1-A.
[18] October 11 Submission at 12.
[19] *Id.* at 13.
[20] S-4 at 163.
[21] *Id.* at 15-16.

maintains that Times Mirror has no PrimeStar distribution rights. Cox Cable asserts, finally, that the merger will not alter Cox Cable's current PrimeStar distribution rights.[22]

14. Moreover, Cox Cable argues that the "cable industry faces the immediate prospect of competition from telephone companies having substantial financial and technical resources."[23] In support of this proposition, Cox Cable submitted eight separate "video dial-tone" applications filed by telephone companies located in the merged company's service area which, according to Cox Cable, if granted by the Commission, will provide competition for delivered video programming.[24]

15. In addition to arguing that the merger would not have an anticompetitive effect, Cox Cable argues that the proposed transaction will permit it to take advantage of "clustering" -- i.e., the "efficiencies of operating large cable systems." According to Cox Cable, large cable systems benefit from economies of scale, and also permit Cox Cable to place more experienced management teams in place at the system level.[25] Cox Cable contends that these teams are better equipped to handle the changing environment of the cable television industry created by new regulations and increased competition. Cox Cable also states that it has begun the process of consolidating certain non-customer sensitive areas of its operations (e.g., accounting and management information systems) to further enhance operating efficiencies.[26] Cox estimates that these efficiencies could reach approximately $20 million dollars.[27] According to Cox, the combined systems offer an opportunity to achieve certain efficiencies that the Commission identified in its *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, which was submitted to Congress in 1994 ("1994 Competition Report").[28]

B. Discussion

16. Under Title III of the Communications Act, the Commission must determine whether proposed license transfers will serve the public interest, convenience and necessity.[29] Transfer applicants bear the burden of demonstrating that their proposed transfers serve the public interest.[30] Examination of competitive issues that are raised by a proposed transaction is an integral part of the Commission's statutory responsibilities under section 310(d) of the Communications Act.[31] If the Commission finds that the proposed transaction would result in anti-competitive effects, the Commission may impose appropriate remedial conditions[32] or, after hearing, deny the proposed license transfers altogether. Moreover, even if the proposed transaction falls below the thirty percent threshold established by the Commission's horizontal ownership rules, Commission consideration of competitive or other public interest issues raised by a transaction that involves the transfer or assignment of radio licenses is still necessary under Title III.[33]

17. Here, it does not appear that the merger would enable the surviving firm, Cox Cable, to exercise additional market power by raising prices, cutting services, or engaging in strategic conduct that would enable it to exclude competitors or otherwise raise their costs of doing business.[34] First, as Cox Cable argues, there is no evidence to indicate the proposed merger would eliminate any existing competition between Cox Cable and Times Mirror. The two cable operators do not compete at this time.[35]

18. Second, it seems unlikely that the transaction will have any anticompetitive effect relating to the distribution of PrimeStar. Cox Cable states that its PrimeStar distribution rights will not change post-merger.[36] In addition, Cox Cable states that while it has PrimeStar distribution rights in only five of the counties presently served by Times Mirror, there are other PrimeStar distributors in three of these counties -- San Diego, California, Hartford, Connecticut and Providence, Rhode Island. Specifically, Cox Cable states that there are three PrimeStar distributors in Hartford County and two distributors in both Providence County and San Diego County.[37] Finally, the Bureau notes that under the PrimeStar consent decree reached between various state antitrust agencies and the PrimeStar partners,

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[22] November 28, 1994 Submission of Cox Cable at 1 ("November 28 Submission").

[23] October 11 Submission at 16-20.

[24] *Id.*

[25] As of June 30, 1994, 70% of Cox Cable's customers were served by cable television systems with more than 100,000 homes. S-4 at 153.

[26] S-4 at 153.

[27] *See* Letter dated December 9, 1994 from Dallas S. Clement, Cox Cable's Director of Investment Planning and Analysis, to Commission staff.

[28] October 11 Submission at 8-9. For example, the Competition Report found that a centrally-located regional installation and maintenance office can perform those functions for a number of nearby markets, allowing more efficient use of high-capacity, productive assets. In addition, the Report recognized that it may also be possible to recognize efficiencies from consolidated advertising, marketing and sales functions. *See, e.g.*, 1994 Competition Report at ¶ 151.

[29] *See* 47 U.S.C. § 310(d).

[30] 47 U.S.C. § 308(b).

[31] *Tele-Communications, Inc. & Liberty Media Corp. -- Applications for Consent to Transfer Control of Radio Licenses*, ¶ 16, 9 FCC Rcd 4783 (Cable Services Bureau, 1994) (*"TCI-Liberty"); In re GTE Corp. and United Telecommunications, Inc. -- Application for Consent to Assignment of Licenses and Transfer of Control*, ¶ 8 (File No. ENF-86-4) (Common Carrier Bureau, June 16, 1986); *see also United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc)* (Commission is required to "make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations") (*quoting, Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968)); *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 755-62 (1973).

[32] *See, e.g., In re General Telephone and Electronics Corporation and Telenet Corp.*, 72 FCC 2d 111 (1979) *(GTE-Telenet), request for comments*, 85 FCC 2d 409 (1981), *order on monitoring compliance*, 91 FCC 2d 215 (1982); *In re GTE Corp. and Southern Pacific Company*, 94 FCC 2d 235 (1983); *Declaratory Ruling and Order, MCI Communications Corp. and British Telecommunications plc*, FCC 94-188 (July 25, 1994) (hereinafter *"MCI-BT")*.

[33] *See TCI-Liberty* at ¶ 20 (footnote omitted) (the horizontal rule "places a ceiling on ownership. . . . It does not provide an automatic safe-harbor' for all mergers creating entities reaching fewer than 30% of homes passed nation-wide.")

[34] In light of this finding, we need not reach Cox Cable's assertion that it will continue to face competition from DBS services and wireless cable operators (MMDS) in several states, and will ultimately face competition from telephone companies offering VDT services.

[35] *See supra* para. 13.

[36] November 28 Submission at 1; December 13, 1994 Submission of Cox Cable at 2 ("December 13 Submission").

[37] December 13 Submission at 2.

Primestar is prohibited from granting exclusive distribution rights to the PrimeStar partners, including Cox Cable, in each partner's cable television franchise areas.[38]

19. Finally, the record in this proceeding indicates that the merger will increase regional clustering by Cox Cable in Southern California and Rhode Island. As the Commission recognized in the 1994 Competition Report, such regional clustering may have both pro- and anticompetitive effects. For example, clustering may result in operational and administrative efficiencies, and may also facilitate the ability of a cable operator to provide local telephone service in competition with local exchange carriers.[39] However, the formation of large regional clusters may send an entry-deterring signal to potential rivals. Clustering may also allow a single firm, or a few surviving operators through coordination of their conduct, to pursue entry-deterring strategies that raise rivals' costs.[40] Here, there is no evidence in this record that the merger will result in any of the potential anticompetitive effects of clustering. On the other hand, Cox Cable has shown that the proposed merger will yield certain operational and administrative efficiencies.[41]

20. Accordingly, in light of the foregoing and the fact that no party has filed a petition to deny or comments adducing evidence to the contrary, the Bureau finds that the proposed license transfer applications will serve the public interest, convenience and necessity and therefore will be granted.

IV. REQUEST FOR SPECIAL RELIEF

A. Applicant's Submission

21. On September 21, 1994, Cox Cable filed a petition for special relief requesting a temporary waiver of section 76.501(a) of the Commission's Rules and section 613(a)(1) of the Communications Act, which prohibit a cable operator from owning a television broadcast station whose Grade B contour covers any portion of the community served by the operator's cable system. According to Cox Cable, the proposed merger would create a prohibited cross-ownership interest, as it would own two broadcast television stations serving the same area as a few of the cable systems it proposes to acquire from Times Mirror. Cox Cable's petition for special relief was placed on public notice on October 14, 1994. No opposition was filed.

22. Cox Cable states that after the proposed merger is consummated, there will be several cable systems, currently owned by Times Mirror (hereinafter, the "Times Mirror Waiver Systems"), within the Grade B contours of two television stations controlled by CEI (the "Cox Stations"). Three of the Times Mirror Waiver Systems are within the Grade B contour of WPXI(TV), Pittsburgh, Pennsylvania, an NBC affiliate, and four are within the Grade B contour of WHIO-TV, Dayton, Ohio, a CBS affiliate.

23. In support of its request, Cox Cable raises the following arguments: First, Cox Cable argues that the requested waiver would be limited in time (18 months from the consummation of the proposed merger), and would suffice for Cox Cable to complete an orderly divestiture of the conflicting ownership interests. Thus, according to Cox Cable, a temporary waiver of 18 months "represents a reasonable balance between the policies expressed in the rule and [the Commission's] belief that, in divestiture cases, reasonable accommodation may be made to avoid the risk of 'fire sales'."[42] Second, Cox Cable argues that the Times Mirror Waiver Systems represent only a small part of the value of all the systems to be acquired by Cox Cable in the proposed merger.[43] Third, Cox Cable contends that the population served by the Times Mirror Waiver Systems represents only a small portion of the population within the Grade B contours of the Cox Stations.[44] Fourth, Cox Cable maintains that although the Cox Stations are important network affiliates, they are not the only broadcast television stations that provide Grade B contour or better service to the communities served by the Times Mirror Waiver Systems.[45]

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[38] *State of New York v. Primestar Partners, L.P.*, 1993 [CCH] Trade Cases ¶ 70,403 (S.D.N.Y. 1993).

[39] 1994 Competition Report at ¶ ¶ 151-153. The promotion of competition in the provision of local exchange services is an important public policy goal of the Commission. Accordingly, the Bureau believes that a transaction's implications for competitive entry by a cable operator into the local exchange market should be considered by the Bureau in its review of transactions that may raise competitive concerns as a result of increases in regional concentration.

[40] 1994 Competition Report at ¶ ¶ 154-155.

[41] *See supra* para. 15. Given the absence of record evidence in this proceeding on the issue and the finding that the transaction will not likely result in anticompetitive effects, the Bureau has not addressed whether the clusters created by this merger will promote competition in local exchange markets.

[42] Cox Petition for Special Relief at 5-6 (*citing The Shareholders of Storer Communications, Inc.*, 59 RR2d 611, 614 (1985)).

[43] Cox Petition at 6. According to Cox Cable, as of March 31, 1994, the cable systems owned by Times Mirror passed approximately two million homes. The Times Mirror Waiver Systems pass approximately 67,878 homes, which represents less than 3.3 percent of the total homes passed by all of the cable systems owned by Times Mirror. In addition, the subscribership of the Times Mirror Waiver Systems represents less than 4.1 percent of the subscribers to all of the cable systems owned by Times Mirror. *Id.*

[44] *Id.* at 6-7. According to Cox Cable, the population within the Grade B contour of WPXI(TV) is approximately 3,598,999 persons; the population of the Times Mirror Waiver Systems within the Grade B contour of WPXI(TV) is approximately 130,126 persons, which is approximately 3.63 percent of the population served by WPXI(TV); the population within the Grade B Contour of WHIO-TV is approximately 3,288,678 persons; and the population of the Times Mirror Waiver Systems within the Grade B contour of WHIO-TV is approximately 24,086 persons, which is approximately 0.74 percent of the population served by WHIO-TV. *Id.*

[45] *Id.* at 7-8. According to Cox Cable, each of the communities served by the Times Mirror Waiver Systems receives broadcast television service from multiple stations other than the Cox Stations. For example, Cox Cable states that: the Times Mirror Waiver Systems within the Grade B Contour of WPXI(TV) each receive Grade B or better service from at least seven broadcast television stations; the entire Beaver Falls area receives such service from nine television stations and partial service from two other stations; each of the communities served by the Times Mirror Waiver Systems and WHIO-TV also receive Grade B contour or better service from at least three broadcast television stations other than WHIO-TV; Washington Court House and Greenfield, respectively receive service from seven and eleven broadcast television stations; and portions of Washington Court House receive Grade B or better service from six other television stations. *Id.*

24. Finally, Cox Cable argues that without the temporary waiver, either the Times Mirror Waiver Systems would have to be sold on a "fire sale" basis, or, upon consummation of the merger, Cox Cable would have to cease service from the Times Mirror Waiver Systems. Thus, Cox Cable submits that a possible result of a denial of the request would be a reduction in service. Cox Cable argues, however, that the Commission has previously recognized that "there is no public interest benefit . . . in removing cable service to the . . . communities involved here until a buyer is found."[46]

B. Discussion

25. In *Golden West Associates, L.P.*,[47] the Commission held that the public interest would be served if it granted license applicants 18 months to divest certain cable systems that were within the Grade B contour of broadcast stations after a merger. According to the Commission:

> [W]e do not believe that Congress could have intended to require the shutdown of an operating cable system and loss of service to the public where a substantial sale is involved and where the cable system, as here, is a very small part of the transaction. There is no public benefit we perceive in removing cable service to the four communities involved here until a buyer is found. Furthermore, given the abundance of media serving the [market,] we do not believe that any undue harm or concentration will result from permitting the [acquiror] to divest itself of its cable interests after its acquisition of [the acquiree] has occurred. Nor do we believe that Congress intended to require "fire sales" as the result of the need to divest properties quickly after Commission approval of complex transfers, but before consummation of the transaction. In view of the foregoing, and given the nature of the facilities, we believe that an 18-month period of time, from the date of consummation of the sale, would be sufficient for [the acquiror] to divest itself of the cable systems.[48]

Following *Golden West*, the Commission has, in limited circumstances, permitted other parties 18 months to divest prohibited cable assets.[49]

26. In light of the above, the Bureau believes that Cox Cable has sufficiently demonstrated that the public interest would be served by granting Cox 18 months to dispose of the Times Mirror Waiver Systems. The Bureau agrees with Cox Cable that 18 months from the consummation of the merger is a reasonable period so as to avoid the necessity of a "fire sale" or reduction of service. Further, the Bureau agrees that the Times Mirror Waiver Systems represent only a small part of the total value of the proposed merger, these systems serve only a small portion of the population in the Grade B contour of the Cox Stations, and other non-Cox owned broadcast television stations also serve the area served by the Times Mirror Waiver Systems. However, to ensure against any possible abuse of this grant, Cox Cable will be required to immediately notify the Commission at the time it consummates the sale of each of the Times Mirror Waiver Systems. If Cox Cable is unable to dispose of all of these systems within the 18 month period permitted by this order, Cox Cable shall also notify the Commission of this situation as well.

V. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that:

(A) the pending CARS license transfer applications referenced herein shall be GRANTED; and

(B) the request for special relief and waiver referenced herein shall be GRANTED.

28. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[46] *Id.* at 8-9 (*citing Golden West Associates*, 59 RR2d 125, 132 (1985)).

[47] 59 RR2d 125 (1985).

[48] *Id.* at 132.

[49] *See Storer Communications, Inc.*, 59 RR2d 611, 613-14 (1985) (sale within a very short time presents likelihood that only buyers with immediate access to large amounts of capital would be successful bidders; other groups such as local buyers or minorities may take a longer period to arrange for needed funds); *Capital Cities Communications, Inc.*, 59 RR2d 451, 456, 466 (1985); *Cablevision VI, Inc.*, 5 FCC Rcd 7166 (1990); *see also Time Warner Entertainment Company, L.P. & U S West Communications, Inc.*, 8 FCC Rcd 7106, 7107 (1993) ("the Commission has recognized the public interest in avoiding disruption of service to subscribers during the time needed to accomplish the divestiture that is required by the cross ownership provisions").

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Withdrawal of FCC Form 329	MI0372
Rate Complaints against C-TEC Cable Systems	MI0676

ORDER

Adopted: December 23, 1994; Released: December 29, 1994

By the Chief, Cable Services Bureau:

1. In each of the cases noted above, the local franchising authority (LFA) filed a complaint with this Commission alleging that the prices charged by C-TEC Cable Systems, (C-TEC) for cable programming service tier (CPS) services in its community were unreasonably high. These complaints, and the local franchising authorities and filing dates, are noted at Attachment A. Between September 20 and November 10, 1994, many of these LFAs wrote to the Commission to withdraw their CPS complaints.[1] In each case, the LFA was the only complainant who filed with this Commission. Our jurisdiction to regulate CPS rates arises with the filing of a valid complaint against those rates. The withdrawal of the only complaint against an operator's CPS rates in a community constitutes the termination of our jurisdiction to regulate those rates. We will allow the withdrawal of these complaints, and our review of these filings will therefore be terminated.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] In each case captioned above, C-TEC did file either an FCC Form 393 benchmark rate justification submission or a cost of service rate justification submission.

4. This Commission has now received from each of the captioned local franchising authorities a letter stating that it wished to withdraw its CPS rate complaint against C-TEC. Under our rules, this Commission's authority to regulate CPS cable rates arises when a valid complaint against those rates is filed. In each case noted here, the LFA is the only complainant against this operator in this community. Our mandate is to "protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a system were subject to effective competition."[9] While our rules forbid collusive agreements between operators and local franchising authorities regarding forebearance from rate regulation, there is no evidence of such an agreement here. In these letters, in fact, the LFA states that it has completed a rate review of the basic rates, and has found them reasonable. It is on the basis of this finding of reasonableness, rather than on the basis of an underlying agreement to forebear, that these LFAs are seeking to withdraw their CPS rate complaints. We will accordingly allow these complainants to withdraw their complaints. Because our review of the rate justification showings is predicated on the existence of a rate complaint, in those instances where the operator no longer faces rate complaints in the above-noted communities, we are terminating our review of those filings.

5. Accordingly, IT IS ORDERED that permission to withdraw the FCC Form 329 rate complaints against cable programming service rates in the above-noted communities IS GRANTED, and the review of the resulting rate justification filings IS TERMINATED to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] The dates of the withdrawal letters are noted in Attachment A.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993)(Cable Act of 1992).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R.§ 76.956(b).

[5] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[6] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) (Benchmark Order): 47 C.F.R. § 76.922(b).

[7] *See Benchmark Order*, 9 FCC Rcd at 4190, paras. 150-152.

[8] *Id.*

[9] Conference Report on the Cable Act of 1992, at 62. *See also*, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) (*Rate Order)* at 5669.

Attachment A

C-TEC CPS Complaint Withdrawals

CUID No. Local Franchising Authority	Complaints Filed	Complaints Withdrawn
Grand Haven Charter Township	11/18/93	9/30/94
Township of Cannon	3/16/94	9/27/94

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released December 29, 1994

PACIFIC BELL TO SUPPLEMENT INFORMATION FILED IN CONNECTION WITH SECTION 214 VIDEO DIALTONE APPLICATIONS FILE NOS. W-P-C-6913, W-P-C-6914, W-P-C-6915, AND W-P-C-6916

On December 16, and December 22, 1994, Pacific Bell filed supplemental data responding to questions raised by the Commission with respect to its applications for Section 214 video dialtone authority in the above-captioned proceedings. Comments on Pacific's responses are due by January 6, 1995.

On December 28, 1994, Pacific Bell requested that the Commission defer action on its application until after Pacific has had an opportunity to further supplement the record to address any questions and issues raised by commenters on January 6, 1995. Pacific Bell expects to file its reply by January 13, 1995.

Interested parties are invited to file comments on Pacific Bell's January 13, 1995 reply. Comments should be filed on or before **12:00 noon** on **January 20, 1995** with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Two copies, referencing the file numbers provided above, should also be sent to the Chief of the Policy and Program Planning Division, Common Carrier Bureau in Room 544 of 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Notification of Intent to Adopt Statement of Financial Accounting Standards No. 116 (SFAS-116), "Accounting for Contributions Received and Contributions Made"	AAD 94-156

ORDER

Adopted: December 29, 1994; Released: December 29, 1994

By the Chief, Common Carrier Bureau:

1. In June 1993, the Financial Accounting Standards Board (FASB) adopted Statement of Financial Accounting Standards No. 116 (SFAS-116), "Accounting for Contributions Received and Contributions Made". On September 30, 1994, BellSouth Telecommunications, Inc. (BellSouth), filed a notice of intent to adopt SFAS-116. BellSouth filed this notice pursuant to Section 832.16 of the Commission's rules,[1] which requires carriers subject to Part 32 of our rules to adopt new FASB accounting standards and provides for automatic approval of a new standard unless the Commission notifies carriers that a new standard should not be adopted within 90 days of receipt of their notices that they intend to adopt the standard. This Order gives notice that carriers subject to Part 32 of our rules should not adopt SFAS -116 for federal accounting purposes.

2. SFAS-116 establishes new accounting and reporting standards for contributions. It requires companies to record in the current period a liability and related expense for unconditional pledges to make contributions in future years. Before SFAS-116, companies would record such pledges annually as payments are made. FASB requires companies to follow SFAS-116 for fiscal years beginning after December 15, 1994, for financial reporting purposes.

3. SFAS-116 would allow carriers to record increased expenses in a given year to reflect contributions pledged for future years. This, coupled with the Commission's exogenous cost rules, which allow carriers regulated under price caps to increase their interstate rates to reflect cost increases caused by accounting changes, would allow carriers to recover the entire amount of pledged contributions as an exogenous cost in the year the accounting change is adopted. Adoption of SFAS-116 for federal accounting purposes would also provide local exchange carriers the latitude in subsequent years of reducing their sharing obligations under price caps due to pledges of future contributions.

4. It is the Commission's policy to incorporate changes in generally accepted accounting principles into its regulatory accounting, unless the changes conflict with its regulatory objectives.[2] After reviewing SFAS-116, we conclude that its adoption for federal accounting purposes would conflict with the Commission's regulatory objectives. SFAS-116 makes sense for financial accounting purposes because it better informs investors about the impact of a company's commitments on the financial condition of the company. We do not believe, however, that it is appropriate for regulatory purposes to enable carriers to collect contributions from ratepayers before they are made. Accordingly, we are notifying carriers that they shall not adopt SFAS-116 for Part 32 federal accounting purposes.

5. ACCORDINGLY, IT IS ORDERED, pursuant to Section 32.16 of the Commission's rules, as amended, 47 C.F.R. §32.16, that all subject carriers ARE HEREBY NOTIFIED that they SHALL NOT ADOPT SFAS-116 for federal accounting purposes.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

[1] 47 C.F.R. §32.16.
[2] Revision of the Uniform System of Accounts for Telephone Companies to Accommodate Generally Accepted Accounting Principles, *Report and Order*, 50 F.R. 48408 (November 25, 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services — **GN Docket No. 93-252**

Amendment of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool — **PR Docket No. 89-553**

ORDER ON RECONSIDERATION

Adopted: December 21, 1994; Released: December 22, 1994

By the Commission:

1. On our own motion, pursuant to Section 1.108 of the Commission's rules, we reconsider one aspect of the service rules for the 900 MHz Specialized Mobile Radio ("SMR") band adopted in the *Third Report and Order* in GN Docket No. 93-252.[1] This change involves the continued granting of secondary site authorizations in the band pending implementation of new service and licensing rules for 900 MHz SMR systems.

2. In the *CMRS Order*, we adopted new licensing rules for the 900 MHz SMR band, dividing the 200 channels in the band into 20 blocks of 10 channels apiece and using Major Trading Areas (MTAs) to define the service area encompassed by each license.[2] We provided that in the event of mutually exclusive applications for MTA-based licenses, licensees would be selected by competitive bidding.[3] We also recognized, however, that the 900 MHz band is already used by SMR systems that have been licensed in "Designated Filing Areas" (DFAs), corresponding to the top fifty major markets in the nation.[4] The *CMRS Order* provided that such incumbent 900 MHz SMR systems would be "grandfathered" under the new rules, *i.e.*, incumbents would be afforded full co-channel interference protection for their existing facilities, but they would not be allowed to expand beyond their existing service areas unless they obtained the MTA license for the relevant geographic area and channels.[5]

3. As part of our decision to grandfather incumbent 900 MHz SMR systems, we recognized that some incumbents had been granted authorizations to construct facilities outside of their DFAs, enabling them to expand their systems or link facilities in different markets. Because the Commission discontinued primary site licensing outside the DFAs in 1986,[6] these authorizations were granted on a secondary basis only, *i.e.*, the authorization did not entitle the licensee to protection from co-channel interference. In the *CMRS Order*, we concluded that 900 MHz secondary sites granted prior to August 10, 1994, should be afforded full co-channel protection by MTA licensees.[7] We reasoned that although no protection had been promised for these sites originally, it would be highly disruptive to existing 900 MHz operations if incumbents were required to discontinue operation at secondary sites that had become integral parts of their systems.[8] While electing to protect such sites, however, we concluded that no additional secondary site authorizations should be granted on 900 MHz SMR channels pending implementation of the new rules.[9] Our concern in establishing this cut-off of additional licensing was that the 900 MHz band not be further contaminated in advance of MTA licensing.

4. In reviewing our decision to suspend granting of secondary site authorizations, we affirm the underlying goal of the *CMRS Order* to maximize the availability of spectrum to 900 MHz MTA licensees. We have concluded, however, that an outright prohibition on such authorizations goes further than necessary to accomplish this goal. First, the prohibition imposes a significant burden on 900 MHz incumbents who are presently building out systems and seeking to provide service to consumers.[10] We expect that many of these incumbents will seek and obtain MTA licenses under our new rules, which will give them greater flexibility to respond to customer demands in the long run. Because implementation of the new 900 MHz rules and selection of MTA licensees is still some months away, however,[11] suspending secondary site authorizations will inhibit system expansion in the interim and could thereby delay the availability of service to customers.

5. Second, granting authorizations on a secondary site basis in advance of MTA licensing will not contribute to spectrum contamination. By definition, such sites are not entitled to interference protection from other licensees in

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[1] *Third Report and Order*, Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, FCC 94-212 (adopted August 9, 1994; released September 23, 1994) (*CMRS Order*).

[2] *Id.*, ¶ ¶ 113-117.

[3] *Id.*, ¶ 116.

[4] *See First Report and Order and Further Notice of Proposed Rulemaking* in PR Docket No. 89-553, ("900 MHz SMR Phase II Notice"), 8 FCC Rcd 1469, 1470 (1993).

[5] *Id.*, ¶ 118.

[6] *See Public Notice, "Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands,"* November 4, 1986.

[7] *Id.*, ¶ 119.

[8] *Id.*

[9] *Id.*

[10] Some 900 MHz licensees have indicated that their plans for system expansion have been delayed by the suspension of secondary site grants. *See, e.g., Ex Parte Presentation* of RAM Mobile Data USA Limited Partnership in GN Docket 93-252, August 29, 1994, at 2-3.

[11] We did not adopt final technical, operational, and licensing rules for the 900 MHz band in the *CMRS Order*. Instead, we indicated that such rules would be addressed in a subsequent order in PR Docket 89-553, the 900 MHz "Phase II" docket. *See CMRS Order*, ¶ 113 n.216, ¶ 116 n.220.

the band.[12] Thus, if we continue to grant secondary site authorizations in the 900 MHz band, 900 MHz MTA licensees will be under no obligation to provide interference protection to such sites, while secondary users will be required to discontinue any operations that interfere with an MTA-licensed system. Under these circumstances, the MTA licensing process is not compromised and no additional burden is placed on MTA licensees. The risk of operating without interference protection is instead placed solely on the licensee of the secondary site.

6. For the foregoing reasons, we have decided to allow licensing of secondary sites in the 900 MHz SMR band to resume. We emphasize that authorizations granted under this Order will be strictly secondary in nature, and that no licensee operating under such an authorization will be entitled to interference protection of any kind from the MTA licensee eventually authorized to operate on the same frequency in that area.[13] By taking this action, we allow licensees to carry on with expansion of their systems if they so choose, but such licensees also assume the risk of operating without interference protection and being required to discontinue operations that cause interference to MTA licensees.[14]

7. Accordingly, IT IS ORDERED that secondary site authorizations may be granted to qualified applicants in the 900 MHz SMR service in accordance with the provisions of this Order.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[12] *See* 47 C.F.R. § 90.7 (Definition of "secondary operation").

[13] Of course, the secondary site licensee may obtain the MTA license, thereby ensuring protection for its site on the same basis as all other facilities encompassed by the MTA license.

[14] The Commission will strictly enforce the no-interference policy regarding secondary operation, which is defined in 47 C.F.R. § 90.7.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture	**CC Docket No. 89-79**
Policy and Rules Concerning Rates for Dominant Carriers	**CC Docket No. 87-313**
Petitions for Reconsideration	

MEMORANDUM OPINION AND ORDER ON THIRD FURTHER RECONSIDERATION

Adopted: December 23, 1994; Released: December 29, 1994

By the Commission:

I. INTRODUCTION

1. In these petitions for reconsideration, the Ameritech Operating Companies (Ameritech), MCI Telecommunications Corporation (MCI), and Williams Telecommunications Group, Inc. (Wiltel) challenge the Commission's order revising the cost support standards applicable to new services as defined by the Commission's price cap rules.[1] No oppositions to these petitions were filed. For the reasons discussed below, we deny the petitions for reconsideration filed by MCI and Wiltel, and dismiss Ameritech's petition for reconsideration.

II. BACKGROUND

2. In the *Part 69 ONA Order*,[2] the Commission established a flexible, cost-based upper bound for prices of new services provided by local exchange carriers (LECs) pursuant to price cap regulation. New services are defined as those that expand the range of service options available to consumers.[3] In pertinent part, LECs introducing new services are required to show that they have used a consistent costing methodology for direct costs "for all related services."[4] We gave "all local switching services" as an example of a group of related services.[5] In addition, the Commission offered LECs an opportunity to recover a "risk premium" to provide incentives for the development of new and potentially risky services.[6] Finally, although we did not mandate uniform overhead loading, we required LECs to establish a methodology for determining overhead costs loaded onto new services, and to justify the methodology they select as well as any deviations from it.[7] We stated that we would evaluate the reasonableness of the overhead costs that are loaded onto the direct cost of the new service.[8]

3. In the *Second Reconsideration Order*, the Commission modified the new services test to encourage the introduction of services that are close substitutes for existing services. For new services that are lower priced substitutes for existing services, use of a uniform overhead loading factor could tend to lower revenues, creating a disincentive to introduce new services based on new technology. In the *Second Reconsideration Order*, the Commission specifically authorized the use of non-uniform loadings for new services priced below close substitute services to enable a LEC to break even in revenues.[9]

III. DISCUSSION

A. Overhead Loading Requirements for Close Substitute New Services

4. MCI and Wiltel assert that our revision of the new services test in the *Second Reconsideration Order* permits unreasonable overhead loadings for new services. In the *Second Reconsideration Order*, the Commission stated that non-uniform overhead loadings are "presumptively reasonable" whenever a LEC uses them to justify the introduction of a new service at a level below the price of the existing, close substitute service.[10] MCI and Wiltel interpret this language to justify any level of overhead loadings for

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[1] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket Nos. 89-79 and 87-313, Memorandum Opinion and Order on Second Further Reconsideration, 7 FCC Rcd 5235 (1992) (*Second Reconsideration Order*).

[2] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket Nos. 89-79 and 87-313, Report and Order and Order on Further Reconsideration and Notice of Proposed Rulemaking, 6 FCC Rcd 4524, 4531 (para. 42) (1991) (*Part 69 ONA Order*).

[3] *See* Section 61.3(s) of the Commission's Rules, 47 C.F.R. § 61.3(s) (new service definition); Sections 61.49(g)(2) and (h) of the Commission's Rules, 47 C.F.R. §§ 61.49(g)(2), (h). The Commission adopted a lower bound for new service prices in the *LEC Price Cap Order*. Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6824 (para. 314) (1990) (*LEC Price Cap Order*) and Erratum, 5 FCC Rcd 7664 (1990). While the *Part 69 ONA Order* was pending, we also established a new service upper bound on an interim basis. Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Order on Reconsideration, 6 FCC Rcd 2637, 2694-94 (para. 126) (1991) (*LEC Price Cap Reconsideration Order*).

[4] *Part 69 ONA Order*, 6 FCC Rcd at 4531 (para. 42). We also required carriers to submit the ratio of direct unit cost to unit investment. *Id.* (para. 44).

[5] *Id.*

[6] *Id.* at 4531 (para. 43).

[7] *Id.* at 4531 (para. 44).

[8] *Id.* (also requiring carriers to file overhead loading factors for each rate element).

[9] *Second Reconsideration Order*, 7 FCC Rcd at 5236-37 (paras. 8-11).

[10] *Second Reconsideration Order*, 7 FCC Rcd at 5237 (para. 11).

new services as long as the new price is lower than the price of a comparable existing service.[11] MCI recommends that the Commission examine the overhead loadings of each individual new service for reasonableness.[12] Wiltel requests that we direct LECs to recover an amount of overhead costs equal to the overhead recovery on the existing service on a "per unit" basis, as opposed to the percentage-based uniform overhead loading factor discussed in the *Second Reconsideration Order*.[13] Wiltel also advocates collecting information on average overhead loadings from LECs, in order to establish a benchmark by which to judge overhead loading ratios.[14]

5. As we explained in the *Second Reconsideration Order*, our new service test revisions will benefit LEC customers by encouraging LECs to develop new services based on new technology that makes a service less expensive to provide. Ratepayers are protected because the presumption that overheads are reasonable extends only to cases in which the price of the close substitute service is below that of the existing service.[15] In addition, new services often represent quality improvements in the form of new or improved functionalities.[16] Therefore, contrary to petitioners' arguments, the new services test encourages the availability of less expensive services that offer improved quality. Finally, the new services test requires examination of the carrier's direct costs for reasonableness, compels carriers to file direct cost factors in support of each rate element, and requires that carriers price above direct costs. As a result, we disagree with petitioners that the new services cost support requirements produce a rate that is unreasonable. We deny MCI's and Wiltel's petitions for reconsideration on this issue.

6. We believe it is premature to decide whether to adopt Wiltel's recommendations of a "per unit" test for reasonable overhead loadings, or to establish a benchmarking system for overhead loading factors. In the *Part 69 ONA Order*, the Commission found that the price cap rules governing rates for new services needed to be somewhat flexible to encourage LECs to offer new services, while still protecting ratepayers from unreasonably high prices.[17] Petitioners have presented us with no arguments that warrant further revision of those rules to achieve these dual objectives at this time. We will continue to monitor LEC new service pricing to determine whether any adjustments to the standard are required in the future.

B. Overhead Loading Requirements and Discrimination

7. MCI maintains that the new services test revisions we adopted in the *Second Reconsideration Order* could lead to discriminatory prices because the test might permit different prices for like services.[18] Wiltel fears that, under the new service test, LECs will be able to load relatively few overhead costs onto new services used predominantly by large access customers, specifically American Telephone and Telegraph Company (AT&T). Wiltel also assumes that the new services test will permit LECs to establish volume discounts for new services which will be available only to AT&T. Wiltel believes that loading overhead costs in these fashions result in unreasonable discrimination against small access customers.[19] Wiltel recommends that we require BOCs to show that overhead costs are loaded uniformly on all volume pricing bands of new services.[20]

8. The Commission, in adopting the new services test, did not intend to imply that the anti-discrimination provisions contained in Section 202(a) of the Communications Act would not apply to evaluating new service pricing.[21] The potential for unreasonable discrimination between a new service and an existing service remains if (1) the two services are "like" services; (2) the two services are priced differently, and (3) there is no cost justification or other basis to support the discrimination. While we agree with petitioners that new services may potentially raise discrimination concerns, we disagree that the *Second Reconsideration Order* foreclosed our ability to examine discrimination issues. To the contrary, we retain the ability to address discrimination issues in the tariff review process, in response to a complaint filed pursuant to Section 208 of the Communications Act, or our own motion under Section 205 of the Act.

9. Furthermore, Wiltel's and MCI's concern is speculative. The petitioners have not shown that all services that are substitutes for each other are necessarily "like" each other within the meaning of Section 202(a) of the Communications Act. Nor have they provided any reason to assume that, if a new service is priced lower than an existing close substitute service, this price disparity would necessarily be "unreasonable discrimination" within the meaning of Section 202.[22]

10. Wiltel also maintains that, to protect customers from discrimination, it is necessary to require BOCs to use the same costing methodology to develop direct costs for all services, rather than "all related services." As an example, Wiltel asserts that use of different methodologies for switching and transport services could have a disparate impact on different access customers or could interfere with the devel-

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[11] MCI Petition at 1-6; Wiltel Petition at 14-15.
[12] MCI Petition at 5-6.
[13] Wiltel Petition at 16.
[14] *Id.* at 17.
[15] *Second Reconsideration Order*, 7 FCC Rcd at 5237 (para. 11).
[16] One example of these kinds of services are fiber ring services, which are an improvement over special access services because they are less likely to experience service outages. Another example of a close substitute new service is electronic white pages. *See, e.g.*, BellSouth, Petition for Waiver for Electronic Directory Assistance, 5 FCC Rcd 7121 (Com. Car. Bur. 1990)).
[17] *Part 69 ONA Order*, 6 FCC Rcd at 4531 (para. 44).
[18] MCI Petition at 5.
[19] Wiltel Petition, *passim*. C
[20] *Id.* at 16.
[21] Section 202 of the Communications Act, 47 U.S.C. § 202.
[22] MCI alleges that pricing that would have been considered unlawful discrimination prior to adoption of price cap regulation might be "simply excused as price cap pricing flexibility' for the LECs" under the new services test. MCI Petition at 5. Such an allegation is unfounded. In the *LEC Price Cap Order*, 5 FCC Rcd at 6835 n.561, we specifically stated that complaints alleging unreasonable discrimination will continue to be considered. None of our later orders revising the new services test altered our commitment to protecting customers from unreasonable discrimination. *See also* Wiltel Petition at 6.

opment of competition in the access services market.[23] Wiltel offers no legal precedent to support its assertion that using different costing methodologies to develop direct costs for unrelated services would, by itself, violate Section 202(a) of the Communications Act, prohibiting unreasonable discrimination between like services. Wiltel also fails to cite any section of the Communications Act or any Commission rule that would require the same costing methodology to develop direct costs for unrelated services. For these reasons, we decline to adopt Wiltel's recommendation at this time.

11. Furthermore, with respect to Wiltel's example of local switching and transport, we have recently revised the price cap rules to move transport services from the traffic sensitive basket to a new basket named the trunking basket, along with all special access services.[24] We conclude that Wiltel's concerns regarding switching and transport services are answered adequately by our revision of the price cap baskets, and therefore we will take no further action at this time.[25]

C. Other Arguments

12. Ameritech maintains that the new services test should be applied only to monopoly services, and argues that competitive forces are adequate to limit prices for other new services.[26] According to Ameritech, any upper bound for new service prices, even one including a risk premium, discourages innovation.[27] Ameritech also contends that the risk premium is inadequate to encourage innovation, because the required showing is too burdensome, and because there is uncertainty over whether the risk premium will be granted at the time Ameritech begins developing the new service.[28] In the *Second Reconsideration Order*, we considered and rejected petitions for reconsideration advocating elimination of the new services test[29] and seeking liberalization of the risk premium.[30] Accordingly, we dismiss Ameritech's petition as repetitious. Section 1.429(i) of the Commission's Rules, 47 C.F.R. § 1.429(i).

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by MCI Telecommunications Corporation and Williams Telecommunications Group, Inc. ARE DENIED.

14. IT IS FURTHER ORDERED that the petition for reconsideration filed by Ameritech Operating Companies IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[23] Wiltel Petition at 18-19. *See also Part 69 ONA Order*, 6 FCC Rcd at 4531 (para. 42).

[24] Transport Rate Structure and Pricing, Second Report and Order, CC Docket No. 91-213, 9 FCC 615, 622 (para. 12) (1994).

[25] Wiltel also advocates extending the new service test to restructured services to prevent this kind of "discrimination" with respect to restructured services. Wiltel Petition at 21-22. As we found above with respect to new services, Wiltel's concerns regarding "discrimination" among restructured services are speculative.

[26] Ameritech Petition at 3-6.

[27] Ameritech Petition at 6-7.

[28] Ameritech Petition at 8-9.

[29] *Second Reconsideration Order*, 7 FCC Rcd at 5236 (para. 6).

[30] *Second Reconsideration Order*, 7 FCC Rcd at 5238 (para. 22).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-141

In the Matter of

GTE Telephone Operating Companies

Investigation of Transmittal Nos. 711 and 750
Below-band Transport Rates

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1994; Released: December 29, 1994

By the Commission:

I. BACKGROUND

1. In its 1992 annual access tariff filing, the GTE Telephone Operating Companies (GTE) filed substantially reduced below-band rates for transport service in several GTE study areas.[1] Below-band filings must be accompanied by a showing that the rates will cover average variable costs (AVC), and are otherwise just, reasonable, and nondiscriminatory.[2]

2. Some of GTE's below-band transport rates were lowered to a level at or near the average variable cost reported in its study. GTE's average variable cost showing, however, consisted only of summary results of incremental cost studies. Consequently, in the *1992 Annual Access Order*,[3] the Common Carrier Bureau concluded that GTE failed to adequately support its below-band transport rates, and suspended those rates for five months pending an investigation to ensure that they were not predatory.[4]

3. In order to evaluate the reasonableness of GTE's filing, the Common Carrier Bureau directed GTE to file a direct case on July 27, 1992. In its direct case, GTE was instructed to: 1) provide the full incremental cost studies supporting its AVC showing results, *e.g.*, the type and cost of equipment used to provide transport and the amount of usage of the equipment; and 2) demonstrate that its rates are just, reasonable and nondiscriminatory. In addition, the Bureau designated two issues for resolution: (1) whether GTE's below band rates are above GTE's average variable costs; and (2) whether GTE's rates are otherwise just, reasonable and nondiscriminatory. In its direct case, GTE provided AVC studies for California, Florida, Southwest and GTE of Washington/Oregon/California-West Coast. GTE's direct case included four components: (i) summary workpapers combining the various cost sub-elements into the total investment required for each rate element; (ii) detail workpapers showing the material, engineering and installation costs of the equipment used to build each specified cost sub-element; (iii) workpapers representing the original summarized AVC results as filed in GTE's 1992 annual access filing; and (iv) return and income tax calculation workpapers. GTE maintains that the rate reductions at issue cover their average variable costs and are otherwise just, reasonable and nondiscriminatory. *See* GTE Direct Case at 11-15.

4. The Association for Local Telecommunications Services (ALTS) filed an opposition to GTE's direct case on August 17, 1992. ALTS first argues that in resolving the designated issues, the Commission must ensure that all variable costs associated with providing GTE's switched transport services are recovered through the appropriate rate elements. ALTS Opposition at 3. In order to capture a reasonable representation of a LEC's variable costs, ALTS contends, the Commission must take into account the accelerated levels of new investment in fiber optic facilities by considering cost data over a "reasonable" period of time. *Id.* at 4. ALTS therefore requests that the Commission clarify that the AVC test requires an averaging of LEC investment data over the most recent five-year period to account for distortions caused by "lumpy investment." *Id.* at i, 5.

5. In its reply to ALTS' opposition, filed August 24, 1992, GTE defends its rates as being a reasonable response to the competitive environment, and as fully consistent with the Commission's incentive regulation. GTE Reply at 2. *See also* GTE Direct Case at 14. According to GTE, it faces significant competition in the major metropolitan areas of Tampa, Los Angeles, Dallas and Seattle, and therefore appropriately selected these areas for rate reductions. *Id.* at 3.

6. GTE also defends the method it used to identify variable costs -- the "snapshot" approach -- which GTE defines as an analysis of cost structure and level (*i.e.*, amount of copper/fiber) on a "present day/present snapshot in time" basis -- as a reasonable, conservative approach for capturing average variable costs. *Id.* at 4-5. GTE maintains that it is an accepted economic standard to view incremental cost on a forward looking basis. *Id.* at 5. Likewise, GTE disagrees with ALTS' position that the Commission should average investment data over the most recent five-year period. GTE argues that there is no legal or academic precedent for ALTS' view, and that a five year historical perspective of costs suggests embedded cost studies and abandoned methodologies such as fully distributed cost. GTE contends that ALTS' position thus departs from the policy and direction of incentive regulation. *Id.*

7. ALTS next contends that the "extraordinary" cost differentials asserted by GTE among its various service areas "strongly indicate" that GTE's direct case

[1] GTE filed below-band rates for GTE California, GTE Florida, GTE Southwest and GTE Washington/Oregon/California-West-Coast. GTE Direct Case at 2.

[2] *See* Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6814, (para. 226) and 6824 (paras. 309-311) (1990) (*LEC Price Cap Order*); Policy and Rules Concerning Rates for Dominant Carriers, Order on Reconsideration, 6 FCC Rcd 2637, 2699 (para. 137) (*LEC Price Cap Reconsideration Order*).

[3] 1992 Annual Access Tariff Filings, CC Docket No. 92-141, 7 FCC Rcd 4734 (1992) (*1992 Annual Access Order*).

[4] These below-band rates became effective on December 15, 1992.

underreports the relevant costs in the four service areas under investigation.[5] ALTS also contends that GTE underreported the costs associated with transport termination by excluding whole categories of relevant costs associated with monitoring and testing switched circuits, as well as spare equipment.[6] Additionally, ALTS contends, GTE excluded the costs of equipment racks, power supplies and fuse panels. ALTS Opposition at 9. ALTS states that the costs of billing and collection, recordkeeping, marketing and order processing were also excluded by GTE in direct violation of the Commission's price cap rules. *Id.* at 10-11.

8. GTE replies that its AVC study provided sufficient cost detail to justify the reasonableness of the costs involved, and that aggregation at the lowest levels is not necessary to describe adequately the variable costs involved. GTE Reply at 6. Further, GTE states, many of the items ALTS claims were excluded from GTE's study were included, but not necessarily shown at the lowest detail. *Id.* For example, GTE asserts, GTE included alarm equipment, equipment racks, power supplies and fuse panels in the "CO Repeater Equipment" category, and accounted for spare equipment in part through the 90 percent circuit equipment and 75 percent outside plant utilization factors. *Id.* at 7-8.

9. Further, GTE argues, it also properly included all relevant costs (*e.g.*, capital costs) and has treated expenses such as marketing, order processing, billing and collection, record keeping and other administrative expenses correctly in determining average variable costs. *Id.* at 9-10. GTE indicates however, that it need not include billing and collection expenses because they are *de minimis*, and is not required to allocate these expenses to the specific rate elements GTE is proposing to change. *Id.*at 10.

10. ALTS also argues that GTE allocated the costs associated with its tandem offices entirely to switched transport termination when such costs should have been allocated to switched transport facility, since the function of tandem offices increases transport efficiency. ALTS Opposition at 10. Further, ALTS assails GTE's methodology for determining output as vague, in that the application of network usage factors is not clarified. ALTS complains that the output is never quantified, and the methodology overstates GTE's output. *Id.* at 11-12.

11. GTE defends its decision to assign tandem costs to transport termination, rather than to the transport facility. GTE maintains that Part 69 of the Commission's Rules does not require tandem costs to be included in the facility element of the transport category, and states that LECs have the latitude to place these costs in either category, or to spread costs across both services in whatever manner reasonable. Since access tandem expenses are not distance sensitive, GTE asserts, it has placed these costs in transport termination. GTE Reply at 9. In challenging its method of determining output, GTE states, ALTS incorrectly assumed a 100 percent fill factor, when GTE used a 90 percent circuit equipment fill factor and 75 percent outside plant fill factor in the cost studies. GTE provides Exhibit 3 to illustrate its use of these fill factors; GTE asserts that the exhibit shows that it did not overstate output or understate cost. *Id.* at 12.

12. Finally, ALTS maintains, GTE's proposed rates are otherwise unreasonable because the 70-80 percent rate cuts proposed by GTE raise barriers to entry by inducing extraordinary volatility into the market, and creating regulatory uncertainty. ALTS Opposition at 15-16. GTE argues that its rates are otherwise just and reasonable because price reductions alone do not prove predatory prices and because the Commission's price cap rules and other regulatory constraints assure that the GTEs cannot abuse their position in the market.[7] GTE Reply at 12.

II. DISCUSSION

13. In both the *AT&T Price Cap Order*[8] and the *LEC Price Cap Order* the Commission expressed the clear sentiment that rate reductions are generally beneficial to consumers, and are more often than not undertaken for competitive reasons.[9] Moreover, the Commission has maintained the view that proven cases of predatory pricing are rare, that below-band reductions introduced under our price cap system will more likely be pro-competitive than predatory, and that the LEC service basket structure further lessens the already unlikely occurrence of predation. In both the *AT&T Price Cap Order* and the *LEC Price Cap Order* the Commission found that average variable cost is central to determining whether prices are predatory for tariff review purposes.[10]

14. This investigation was prompted by a lack of clarity in GTE's cost support that prevented the Bureau from determining whether GTE's rates were so low as not to be just, reasonable and nondiscriminatory. Our decision in this investigation therefore needs to focus on whether those rates are predatory. In making this determination, we believe we should place great weight on whether GTE passes the average variable cost standard established in the price cap rules for tariff review of below band filings. That standard was designed as a check against predation, and is drawn from federal circuit court decisions in antitrust cases.[11]

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[5] ALTS states that GTE's proposed premium transport termination charge for California would be set at 84 percent below GTE's Montana rates, 76 percent below its Michigan rates, 72 percent below its Illinois rates, and 55 percent below its Pennsylvania rates. *Id.* at 7.

[6] ALTS states that the combined cost of test and spare equipment is significant and attaches, as an example, a page from Illinois Bell's intrastate Optical Interconnection Service tariff, which shows that the total charges for its test and spare equipment amount to almost one-third of the entire variable cost GTE reports for a fiber-based special access line termination. *Id.* at i, 8-9.

[7] On September 30, 1992, ALTS filed a pleading captioned "*Ex Parte* Filing" responding to GTE's reply. GTE filed an opposition and motion to strike ALTS' pleading as unauthorized and untimely on October 5, 1992; ALTS filed an opposition to the motion to strike dated October 15, 1992. We will accept ALTS' filing as a permissible *ex parte* presentation. *See* 47 C.F.R. § 1.1206. Nothing in this filing leads us to reach a different result.

[8] Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice, 4 FCC Rcd 2873 (1989) and Erratum, 4 FCC Rcd 3379 (1989).

[9] *See AT&T Price Cap Order*, 4 FCC Rcd at 3114 (para 499); *LEC Price Cap Order*, 5 FCC Rcd at 6824 (para. 309).

[10] *See AT&T Price Cap Order*, 4 FCC Rcd at 3114-15 (paras. 499-500); *LEC Price Cap Order*, 5 FCC Rcd at 6824 (paras. 309-311).

[11] *AT&T Price Cap Order* at 3114-3115.

15. In the price cap orders, the Commission specified certain types of costs which must be included in the calculation of the cost floor. The Commission stated that at a minimum, variable costs should include all access charges and billing and collection costs attributable to the service, as well as other non-fixed costs which would not be incurred if the service were not offered.[12] AVC showings submitted in the past[13] have had the following characteristics: (1) for the service in question, the unit costs of plant investment,[14] network maintenance and operations, and customer operations, as well as other costs specified in the price cap orders, were included in the calculation of the cost floor; and (2) such costs were "forward-looking," *i.e.*, costs that a new service provider seeking to offer ongoing service for a reasonable duration would face in the market today. Forward-looking costs are based on current and anticipated prices, not embedded costs, and are based on a service configuration embodying state of the art technology.[15]

16. GTE has developed its costs using a method similar to that outlined above.[16] One major difference is that GTE used a "snapshot" approach to capture the costs of its current network, thereby including more embedded (copper) facilities than would be included if the transport facility were built today. Since the cost of copper facilities exceeds that of fiber optic facilities which would predominate in the future, calculations more heavily weighted toward copper result in a higher AVC cost floor than under the method outlined above. Since GTE can show that its prices exceed the higher AVC cost floor, GTE's variation in method does not invalidate its AVC showing.[17] Another difference is that contrary to the Commission's direction in the *AT&T Price Cap Order*, GTE did not include billing and collection costs in the rate elements it proposes modifying. GTE has recalculated its AVC including billing and collection costs and has shown that in each study area except for Florida its proposed rates exceed AVC.[18] GTE has refiled its Florida rates to raise them above the recalculated AVC.[19]

17. GTE has demonstrated that its costs meet or exceed its average variable cost, and has thus made the showing required for below-band rates. GTE has also adequately addressed ALTS' allegations that GTE underreported costs and overestimated service output.[20] In addition, there is nothing else in the record to support a conclusion that GTE's rates are otherwise unreasonable or unreasonably discriminatory. Accordingly, we find that GTE's rates are lawful.

III. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that the investigation of GTE's below band transport rates initiated by the Common Carrier Bureau in the *1992 Annual Access Order* IS TERMINATED.

19. IT IS FURTHER ORDERED that GTE's motion to strike ALTS' *"Ex Parte* Filing" IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[12] *See e.g., AT&T Price Cap Order*, 4 FCC Rcd at 3115 (1989).

[13] *See e.g.*, AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 2777, effective January 1, 1991; AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 2717, effective December 30, 1990; and AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 2661, effective December 8, 1991.

[14] Such costs would include "capital costs," *i.e.*, depreciation expense, net return, and relevant taxes. *See* Alfred E. Kahn, The Economics of Regulation: Principles and Institutions, Vol. 1 at 32-36 (1970).

[15] "For it is current and anticipated cost, rather than historical cost, that is relevant to business decisions to enter markets and price products. . . . The historical costs associated with the plant already in place are essentially irrelevant to this decision since those costs are 'sunk' and unavoidable and are unaffected by a new production decision." *MCI Communications Corporation v. American Telephone and Telegraph Company*, 708 F.2d 1081, 1116-17 (7th Cir. 1983). For this reason, we reject ALTS' suggestion that a LEC average its investment over the most recent five year period.

[16] GTE provided its billing and collection costs for the affected switched access rates in an *Ex Parte* letter filed October 21, 1992.

[17] We note that GTE made a number of assumptions (such as average distance of the transport facility and the rounding up of the percent of fiber) which have the effect of lowering the reported average variable cost. In general, however, it appears that the effect of these assumptions is more than offset by the overall conservative nature of GTE's study methodology (*e.g.*, the inclusion of copper facilities in determining the cost of its network).

[18] *See* note 15, *infra*. C

[19] GTE Tariff F.C.C. No. 1, Transmittal No. 750, filed October 30, 1992. These rates became effective December 15, 1992.

[20] *See* paras. 8, 9, and 11 *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-71

In the Matter of

Amendment of Section 73.202(b), RM-8134
Table of Allotments
FM Broadcast Stations
(Wickenburg, Arizona).

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 7, 1995; Released: February 10, 1995

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by Vulture Peak Restoration Group ("Vulture") of the *Report and Order* ("*R&O*")[1] in the above captioned proceeding. The *R&O* substituted Channel 231C3 for Channel 229A at Wickenburg, Arizona, and modified the license for Station KMEO(FM), Wickenburg, to specify operation on the upgraded channel. Circle S Broadcasting Co., Inc. ("Circle"), licensee of Stations KTIM(AM) and KMEO(FM), Wickenburg, filed an opposition. No other comments were received.

2. *Background.* This proceeding originated with the filing of a rulemaking petition by Circle to substitute Channel 231C3 for Channel 229A at Wickenburg and to modify its license accordingly. Vulture, an organization of homeowners and citizens residing near Circle's current transmitting tower for Stations KTIM(AM) and KMEO(FM), opposed Circle's rulemaking petition on two grounds. First, it raised questions regarding the environmental impact of the current tower for Stations KTIM(AM) and KMEO(FM) as well as the proposed tower for Station KMEO(FM) which would be built at a different site to implement the upgrade. Second, Vulture alleged that Station KMEO(FM) at its current site is causing interference to television channels 8 and 10 and that this interference is likely to intensify if the rulemaking proposal were granted. As a result of both of these concerns, Vulture requested that Circle's proposed upgrade of its allotment be conditioned upon the removal of its existing 499 foot tower for Stations KTIM(AM) and KMEO(FM) and its relocation to an area beyond an 11.6 mile radius of Wickenburg.

3. In the *R&O*, the Chief, Allocations Branch, rejected Vulture's arguments and granted Circle's upgrade proposal. Specifically, the Chief determined that Vulture's concerns regarding the environmental impact of Station KTIM(AM)'s current tower and its dismantling were inappropriate for consideration since the Commission had authorized the tower's construction in 1991. Likewise, environmental concerns with the proposed tower would be appropriate for consideration at the application, as opposed to the allotment, stage. Second, the Chief determined that Vulture's allegations regarding interference on television Channels 8 and 10 were speculative in the absence of any technical demonstrations by the affected licensees.

4. *Petition for Reconsideration.* In its petition, Vulture alleges that the Chief, Allocations Branch, should not have dismissed its arguments about interference at the stations' current site as speculative. In support of this contention, Vulture submits a letter from a communications engineer describing the nature and extent of the interference on television channels 8 and 10 that Vulture claims is caused by Station KMEO(FM) at its existing tower. Vulture also submits two additional letters from television service personnel that it claims further substantiates the interference claim. Vulture contends that this information was not available when it submitted its comments in this proceeding and that these letters, as well as its prior submissions, warrant reconsideration of the *Report and Order*.

5. In opposing comments, Circle argues that the letters submitted by Vulture are basically complaints, have no probative value, and are late-filed. Circle also points out that on November 24, 1993, it responded to a Commission letter concerning a complaint that KMEO(FM)'s current operation causes interference to television reception in the city of Wickenburg. Circle states its response to the Commission clearly demonstrated that any interference received is not occasioned by the KMEO(FM) operation. Circle contends that in light of the above, Vulture's petition should be summarily denied.

6. *Discussion.* After careful consideration of the pleadings filed in this proceeding, we find that Vulture's petition for reconsideration should be denied. First, Vulture has not met the requirements of Section 1.429 of the Commission's Rules for introducing new matter in a petition for reconsideration. Specifically, Section 1.429 permits reconsideration based on facts not previously presented to the Commission under certain circumstances. However, none of these circumstances is present here. Vulture has not shown why these letters could not have been obtained earlier through the exercise of ordinary diligence. Also, it has not shown that the facts relied on relate to circumstances which have changed since the last opportunity to present them to the Commission. *See* 47 C.F.R. § 1.429(b)(1) and (2).[2]

7. Second, even if we were to consider the letters, they would not change our analysis of the interference issue. While these letters attempt to demonstrate that Station KMEO(FM), at its current tower, causes interference on television channels 8 and 10 in Wickenburg, this is not relevant to what is at issue in this rulemaking proceeding -- whether or not to substitute an upgraded FM channel for Circle at a new site. On the contrary, allegations of inter-

[1] 9 FCC Rcd 2308 (Allocations Br. 1994).

[2] Circle also argues that the petition should be summarily dismissed pursuant to Section 1.52 of the Commission's Rules since the pleading is not verified. Circle notes that the petition is signed by Alan C. Torgerson, "Coordinator," a non-attorney. We will not, however, dismiss Vulture's petition for lack of verification. While Section 1.429 of the Commission's Rules provides that petitions for reconsideration shall conform to the requirements of Sections 1.49 and 1.52, it specifically states that they "need not be verified." *See* 47 C.F.R. § 1.429(h).

ference from a station's current operations are more appropriately considered as complaints to the Mass Media Bureau's operating branches.[3]

8. As to alleged interference on television channels 8 and 10 that may occur by Circle's implementing its upgrade at a new site, its argument remains speculative. Vulture has not demonstrated that objectionable interference will occur at this new site. Indeed, we note that the new site is located 11.2 kilometers southwest of Circle's current transmitter site and that a different channel will be utilized, which may tend to lessen or alleviate interference concerns by the Vulture homeowners.

9. Further, even if the alleged interference were to occur at the new site, we note that

> [t]he Commission has generally held that interference to television reception caused by FM stations is not a matter taken into account in assigning FM channels. Rather the problem can be more effectively dealt with in connection with the filing of an application for the FM station. See *Policy to Govern the Change of FM Channels to Avoid Interference to Television Reception*, (FCC 66-106), 6 RR 2d (1966). In the past certain measures such as traps and filters have been effective in solving the problem. But the extent of the problem is not known until a specific proposal is before the Commission.[4]

Consistent with this approach, any interference problems that may occur could be considered in connection with Circle's application to implement its upgrade.

10. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Vulture Peak Restoration Group IS DENIED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 776-1660.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

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[3] We note that the letters submitted by Vulture in support of its petition for reconsideration indicate that the alleged interference can be remedied by television viewers through the installation of traps and filters. Similarly, FM licensees are obligated to remedy complaints of blanketing interference in areas adjacent to a transmitting antenna. 47 C.F.R. § 73.318(b).

[4] *Columbia and Monroe City, MO*, 48 RR 2d 1555, 1556 (1981).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

BIG PINE BROADCASTING, INC.
(Assignor)

and File No. BALH-911030GS

JAMES G. WITHERS
(Assignee)

For Assignment of License of
Station KEEP(FM) (formerly KHLC(FM))
Bandera, Texas

RADIO MEDINA, INC. File Nos. BAL-920115EB BAPH-920115EC
(Assignor)

and

JAMES G. WITHERS
(Assignee)

For Assignment of License/Permit of
Stations KRME(AM)/KRBH(FM)
Hondo, Texas

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 1995; Released: February 13, 1995

By the Commission:

1. The Commission has under consideration an "Application for Review" filed on September 23, 1993 by Reding Broadcasting Company ("Reding"). Reding requests review of actions by the Chief, Audio Services Division by letters dated August 24 and November 1, 1993. Those decisions denied Reding's informal objection[1] and granted the above-captioned applications for the assignment of license of Station KEEP(FM) (formerly KHLC(FM)), Bandera, Texas from Big Pine Broadcasting, Inc. ("Big Pine") to James G. Withers ("Withers") and for the assignment of license and permit of Stations KRME(AM) and KRBH(FM), Hondo, Texas from Radio Medina, Inc. ("Radio Medina") to Withers.[2]

2. In its informal objection, Reding argued that the KHLC assignment application proposed to convey a "bare license" to Withers, that Withers is not financially qualified, and that Withers held an undisclosed 49% ownership interest in Radio Medina. In the August 24, 1993 letter, the Chief, Audio Services Division thoroughly considered these contentions and found them to be without merit. Reding's application for review repeats its arguments and we concur that they are without merit.[3]

3. To the extent that Reding's application for review raises new arguments, it must be rejected on procedural grounds. *See* 47 C.F.R. § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."). In any event, the new allegations are highly speculative and bear insufficient support to raise a substantial and material question of fact warranting further inquiry. Specifically, Reding argues that Radio Medina "will remain a real party in interest" in KRME-KRBH based on the fact that Withers is paying much of the purchase price over time. The deferred payment plan, however, is a legitimate business arrangement between the buyer and seller, and does not, standing alone, indicate that the seller is retaining any ownership interest in or control over the stations. Reding also alleges that the KRBH construction permit "is being sold for a profit." However, the section of the original asset purchase agreement concerning contingent future payments -- relied upon by Reding to show that the current value of the FM permit to the parties is in excess of the $10,000 stated purchase price -- was deleted by the parties on March 9, 1993.

4. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's Rules, the "Application for Review" filed on September 23, 1993 by Reding Broadcasting Company IS DENIED.

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[1] Although the Reding pleadings below were styled as "petitions to deny", the Chief, Audio Services Division, in his letter of August 24, 1993, found that Reding lacked standing as a petitioner to deny and treated the pleadings as an informal objection. Reding has not appealed this finding.

[2] On October 6 and 7, 1993, respectively, Withers and Radio Medina filed Oppositions. Reding filed a Reply on October 18, 1993. Withers supplemented his opposition on January 25, 1994 to report that the KHLC assignment of license was consummated on September 22, 1993, the station's call letters were changed to KEEP effective November 1, 1993, and the formerly dark station resumed operations on January 15, 1994. As to KRME and KRBH, Withers' short-form (FCC Form 316) applications to substitute his wholly-owned corporation Five Points Broadcasting, Inc. as assignee was granted by the Commission on January 14, 1994.

[3] We note that *Donald L. Horton (KHIP)*, 10 FCC 2d 271 (1967), cited in Reding's Reply to Opposition to Application for Review in support of the claim that the KHLC assignment application proposed transfer of a "bare license," is inapposite. In *Horton*, a substantial portion of the personal property of KHIP had been repossessed but was nevertheless listed as an asset of KHIP when the assignment of license application for that station was subsequently filed. Here, KEEP has listed equipment that is being conveyed as part of the transaction and there was no evidence to indicate that the equipment would be unavailable to the assignee. We also find that Withers' consummation of the KEEP transaction and restoration of that station to on-air operational status, *see* note 2, *supra*, undercuts Reding's allegations of Withers' lack of financial qualifications. Finally, regarding the unsupported allegation that Withers had an ownership interest in Radio Medina, we note that Withers has specifically denied that charge and Reding has offered no objective contrary evidence.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 19, 1994

Released: December 20, 1994

Gardner F. Gillespie
Hogan & Hartson
Columbia Square
555 Thirteenth St., N.W.
Washington, D.C. 20004-1109

File Number: LOI-93-9

Dear Mr. Gillespie:

On November 17, 1993, the Commission requested information from Coldwater Cablevision, Inc. ("CCI") concerning, among other things, a la carte services offered by CCI in the City of Coldwater, Michigan. *Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Ed D. Geiman, Manager, Coldwater Cablevision,* LOI-93-9 (November 17, 1993). The inquiry was prompted by a letter from the City of Coldwater that questioned CCI's practice of moving channels from rate-regulated cable programming service tiers to packages of a la carte channels.

In a letter to the Cable Services Bureau, dated September 27, 1994, the City of Coldwater sought to withdraw its Form 329 rate complaint filed against CCI. The City stated in that letter that it had completed its review of CCI's rate justification and had resolved the issue of whether CCI's a la carte service offerings are rate-regulated. In an *Order* released December 12, 1994, the Cable Services Bureau granted the City's request to withdraw its complaint against CCI. *Memorandum Opinion and Order,* DA 94-1440 (Cable Services Bureau, December 12, 1994). In addition to granting the City's request, the *Order* terminated the Bureau's review of the rate justification proceeding initiated by the complaint. There is now neither a valid rate complaint nor a pending rate case in the Bureau respecting CCI in the City of Coldwater. Moreover, the City has requested, by letter dated September 27, 1994, that the Commission discontinue its investigation into the issues set forth in the Letter of Inquiry referenced above. Under all these circumstances, we believe that the public interest is not served by our continuing the inquiry of CCI initiated by Letter of Inquiry 93-9. Accordingly, we hereby terminate that inquiry.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

cc: John Pestle
Ed D. Geiman
William R. Stewart

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Meredith Cable Television of Quad Cities Anoka, Minnesota	CUID Nos. MN0362, MN0363, MN0364, MN0365

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1994; Released: December 29, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Meredith Cable, Quad Cities Cable Administrator systems in Minnesota ("Meredith") was charging for its cable programming service ("CPS") tier in its Quad City cable system, headquartered in Anoka, Minnesota, CUID Nos. MN0362 *et al.*[1] Meredith has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Meredith's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on Meredith on February 25, 1994.[12] The Commission received the complaint on March 29, 1994.

5. Meredith filed its first FCC Form 393 filing for its Quad Cities cable systems, headquartered in Anoka, Minnesota, CUID Nos. MN0362 *et al.*, on March 22, 1994 . It was received by the Commission on March 24, 1994.

III. DISCUSSION

6. The rate card provided by Meredith for the CPS tier shows that it was charging a price of $13.73 per subscriber for its CPS tier. Upon comparison of Meredith's charge at the time of the complaint with the allowable benchmark for the same time, we have found no apparent errors that would require an adjustment to the charge in effect.

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[1] According to Meredith, CUID numbers MN0362 - 0365 together constitute a single cable system and have the same programming and rates. Facsimile from Seth A. Davidson of Fleischman and Walsh, L.L.P., Attorneys-of-Record for Meredith Cable, to David O. Ward, Esq., Federal Communications Commission (December 21, 1994).

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Meredith has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Meredith implemented its CPS price under the new regulations. See para. 3, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[12] The complaint was dated February 25, 1993, and states that it was mailed to Meredith on that date. The single form 329 was filed by the Quad Cities Cable Communications Commission, which is the consolidated franchising entity that has jurisdiction over all of the CUIDs covered by this Order. Under these circumstances we will consider February 25, 1994 as the service date.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Meredith has demonstrated that $13.73 per subscriber per month, plus franchise fee, was a reasonable CPS tier price for the period March 29, 1994 to May 14, 1994.[13]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service price charged by Meredith Quad Citites Cable System of Anoka, Minnesota CUID Nos. MN0362 - 0365, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by Meredith Cable (Quad Cities Cable, Anoka, Minnesota), CUID Nos. MN0362 - 0365, for the period March 29, 1994 to May 14, 1994, justifies a maximum price of $13.73 per month (plus franchise fee) for Meredith Cable's Quad Cities Cable systems' cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

CAROLINA TELEPHONE AND TELEGRAPH COMPANY — File No. W-P-C-6999

For Authority under Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain facilities and equipment to provide video dialtone service within geographically defined areas in North Carolina

ORDER AND AUTHORIZATION

Adopted: December 23, 1994; Released: December 28, 1994

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Carolina Telephone and Telegraph Company (Carolina), a wholly-owned subsidiary of Sprint Corporation (Sprint), has filed an application pursuant to Section 214 of the Communications Act of 1934, as amended,[1] for authority to conduct a technical and market trial of video dialtone services in portions of Wake Forest, North Carolina.[2] It proposes to test hybrid fiber/coaxial facilities for the provision of video dialtone service for a period of two years, ultimately passing approximately 1,000 homes and businesses. The National Cable Television Association (NCTA) and the North Carolina Cable Television Association (NCCTA) have filed pleadings against Carolina's application.[3] For the reasons set forth below, we grant Carolina's application, subject to certain conditions and requirements, which are designed to protect the interests of video programmers, video dialtone subscribers, and telephone ratepayers.

II. BACKGROUND

2. In the *Second Report and Order*,[4] the Commission adopted a regulatory framework whereby local telephone companies could participate in the video marketplace, without violating the statutory telephone company-cable television cross-ownership restrictions.[5] The Commission defined "video dialtone" as local telephone company provision of a basic common carrier platform to multiple video programmers on a nondiscriminatory basis.[6] The Commission also determined that carriers must file a Section 214 application before constructing video dialtone facilities.[7]

The Application

3. Carolina seeks authority to conduct a two-year video dialtone trial in Wake Forest, North Carolina to gain experience in, and test the technical feasibility of, delivering video signals over an advanced broadband network. Carolina contends that the trial will enable video programmers to obtain market and operational information. Carolina also seeks to gather data about the provision of non-video programming services and non-programming services to the extent it offers them.[8] It seeks a two-year trial period because approximately 500 of the homes that it seeks to serve have not yet been constructed.

4. Carolina proposes to construct a broadband, hybrid fiber-coaxial cable network consisting primarily of fiber optic transport facilities, optical-electrical nodes, and coaxial cable to connect the nodes to subscribers' premises. It states that its network will offer up to 110 analog video channels over 750 megahertz of bandwidth, and that modulation and/or digital compression technology will give it the flexibility to transform each analog video channel into as many as six digital video channels as necessary to meet customer demand.[9]

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[1] 47 U.S.C. § 214.

[2] Application of Carolina Tel. & Tel. Co., File No. W-P-C-6999, filed September 9, 1994 (Application).

[3] NCCTA and NCTA filed petitions to deny the application on October 21, 1994. Carolina submitted a reply to the petitions on October 31, 1994. NCCTA and NCTA filed replies on November 9, 1994. Carolina submitted an *ex parte* letter on December 14, 1994.

[4] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 7 FCC Rcd 5781 (1992) (*Second Report and Order*), *aff'd & modified on recon.*, FCC 94-269 (Nov. 7, 1994) (*VDT Recon Order*), *appeals pending sub nom. Mankato Citizens Tel. Co., et al. v. FCC*, No. 92-1404, *et al.* (D.C. Cir. Sept. 9, 1992).

[5] One circuit court, the U.S. Court of Appeals for the Fourth Circuit, has found that the statutory telephone company-cable television cross-ownership restriction, codified at 47 U.S.C. § 533(b), violates the First Amendment. *Chesapeake & Potomac Tel. Co. v. United States*, No. 93-2340 (4th Cir. Nov. 21, 1994), *affirming* 830 F. Supp. 909 (E.D. Va. 1993). Federal district courts in four other circuits have also found the statutory cross-ownership restriction unconstitutional. *See NYNEX Corp. v. United States*, No. 93-323-P-C (Me. Dec. 8, 1994); *Ameritech Corp. v. United States*, No. 93 C 6642 (N.D. Ill. Oct. 27, 1994); *BellSouth Corp. v. United States*, No. CV 93-B-2661-S (N.D. Ala. Sept. 23, 1994); *U S WEST, Inc. v. United States*, No. C93-1523R (W.D. Wash. June 15, 1994).

[6] A "basic platform" is a common carriage transmission service coupled with the means by which customers (end users) can gain access to any or all video programming carried on that platform.

[7] *Id.* at 5820, para. 72. Generally, Section 214 requires Commission authorization before a carrier extends a new line of interstate communication.

[8] Carolina declares that its affiliates or other third parties may offer non-video programming services as permitted by the Second Report and Order. Carolina notes that non-video programming services may include news or stock market information services. Non-programming services may include billing and collection, order processing, video customer premises equipment (CPE), and inside wire installation and maintenance. Application at 2 n.4.

[9] *Id.* at 5-6.

5. Carolina states that in addition to video dialtone service, the network will be capable of providing other video services, including movies on demand and interactive applications like games, home shopping, and health care services. Carolina further declares that it will not exercise any control or management in the selection, pricing, or packaging of the video programming. All channels will be made available to video programmers on a first-come, first-served basis. Carolina asserts that it is actively recruiting video programmers, and it anticipates that a mix of 80 analog channels and 180 digital channels will be sufficient to meet video programmer demand. Carolina states that it does not plan to charge video programmers for access to and service provided by the basic platform during the trial.[10] It estimates that 35% to 70% of the 1,000 homes passed will subscribe to video programmer programming, depending on whether the incumbent cable operator becomes a video programmer on Carolina's video dialtone platform.[11]

6. Carolina states that the proposed facilities will be used to provide video dialtone services and are not being built to supplement existing telephony. Carolina notes, however, that with enhancements, the facilities would be capable of offering telephony. Carolina also states that some common plant, consisting of fibers in common sheath, will be constructed for the video dialtone network, and portions of existing common plant, currently used for local exchange and exchange access telecommunications services, may be used for video dialtone.[12]

7. Carolina states that it will separately account for the incremental investments and expenses directly assigned to video dialtone service and the allocated costs, including overhead, of the common plant it employs. It proposes to allocate common costs to video dialtone by multiplying the installed costs of the common plant by the proportion of that plant to be used for video dialtone service, *e.g.*, the fraction of fibers in a fiber sheath that are used for video dialtone. It also declares that it will allocate half of the cost of pedestals and drops to video dialtone. It states that all investment specific, plant non-specific, and overhead expenses supporting the directly assigned and common costs attributed to video dialtone service will, in turn, be allocated under Part 36 separations rules, with the video dialtone share allocated to the interstate jurisdiction.[13] Carolina estimates that the incremental cost of its proposed trial is $5 million.[14]

III. DISCUSSION

8. Applications to construct video dialtone facilities and offer video dialtone services must satisfy both the Commission's video dialtone requirements and Section 214 of the Communications Act.

A. Video Dialtone Issues

9. Local telephone companies wishing to offer video dialtone service must make available a basic common carrier platform to multiple video programmers on a nondiscriminatory basis, and a means by which customers can access any and all of the video programming offered. The platform must provide "sufficient capacity to serve multiple video programmers." The basic platform must be available on a nondiscriminatory, unbundled basis, so that unaffiliated service providers may access the basic platform on the same terms and conditions as an affiliated entity and offer non-regulated or enhanced services in competition with any telephone company-provided non-regulated services. In addition, telephone companies are prohibited from selecting video programming or determining how programming is presented for sale to consumers, including making decisions concerning bundling or "tiering," or the price, terms, and conditions of video programming offered to consumers.[15]

10. Noting that no petitioner challenges Carolina's proposal as failing to provide a common carrier platform with sufficient capacity to serve multiple video programmers on a nondiscriminatory basis, we conclude that Carolina meets these requirements.[16] Carolina states that its proposed network will be capable of offering up to 110 analog channels, and that it will make those channels available to video programmers on a first-come, first-served basis. It also states that it will use modulation, digital compression, or both to gain additional capacity if demand from video progammers for analog channels exceeds the initial analog capacity. We will require Carolina to notify the Chief of the Common Carrier Bureau of any anticipated or existing capacity shortfall that arises during the trial and of its plans for addressing such shortfall within thirty days of when Carolina becomes aware of anticipated shortfall and within five days after denying a video programmer access due to a capacity shortfall.[17] Carolina will be required to expand system capacity to the extent that expansion is technically feasible and economically reasonable in the context of its trial. To the extent Carolina concludes that expansion of the platform's capacity during the trial is not technically feasible or economically reasonable, it must, at the time, explain in detail the basis for its determination.[18]

11. In its application, Carolina has not proposed to use the platform to provide, either directly or indirectly through an affiliate, video programming directly to subscribers during the trial. Carolina states that it will have no role in the selection, packaging, or pricing of video programming offered over the video dialtone network.[19] Telephone company provision of video programming (if otherwise lawful) raises a number of regulatory issues not addressed in this record, which would need to be decided prior to permitting such activity.[20] Allowing Carolina to provide video programming in advance of resolving these issues would not serve the public interest. We therefore

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[10] It modifies this position in a subsequent letter, as noted below.

[11] *Id.* at 6, 8.

[12] *Id.* at 4,5.

[13] *Id.* at 4-5, 9.

[14] *Id.* at Attachment C.

[15] *Second Report and Order*, 7 FCC Rcd at 5783, 5789, 5797, 5817, 5831, paras. 2, 14, 29, 69, 94; see *VDT Recon Order* at paras. 18, 30-33, 109.

[16] NCTA does argue, however, that if Carolina intends to meet its capacity requirements using digital compression, it must identify the associated costs in its application. In response, Carolina states that the relevant costs were provided in Attachment C of its application. Carolina Reply at 6.

[17] *VDT Recon Order*, at para. 38.

[18] *See VDT Recon Order*, at para 38.

[19] Application at 6.

[20] 7 FCC Rcd at 5789, para. 14, 5817, para. 69.

conclude that the public inconvenience and necessity requires, at this time, a condition on this authorization that Carolina not, either directly or indirectly through an affiliate, provide video programming directly to subscribers on this video dialtone system without further action by the Commission.

B. Section 214 Issues

1. Bona Fide Trial

Comments

12. Both NCTA and NCCTA argue that Carolina's proposed trial is not truly a trial. NCCTA alleges that it is a permanent offering, merely characterized as a trial to avoid conventional regulatory and public scrutiny. NCTA argues that trials should not be used to gain an unfair competitive advantage.[21]

13. Both petitioners are particularly critical of Carolina's proposal not to charge video programmers for carriage. Both question the value of any marketing data that such a trial could provide. NCTA states that "[f]ree carriage may improperly induce the incumbent [cable operator] to lease Carolina's facilities . . . and anticompetitively induce subscribers to select the Carolina service over the incumbent." NCCTA argues that it is impossible to determine market demand for video dialtone service if that service is provided to programmers at no charge.[22]

14. Carolina responds by stating its trial is both a technical trial and a market trial. Carolina intends to test various vendors' products and to develop operations and maintenance support systems. It also claims that it needs to offer carriage to video programmers at no charge because its trial is small, and video programmers will incur significant costs in bringing their signals to the Carolina network and acquiring interfaces to connect to the network. Moreover, it notes that video programmers will face the risk associated with testing several vendors' products in a small trial.[23]

15. In response to petitioners' claims that Carolina's failure to charge video programmers will eliminate the market value of the trial, Carolina notes that video programmers will be free to charge their subscribers, which will enable them to gain market data on the levels of penetration they can achieve at different prices. It observes that video programmers would have no incentive to render their data meaningless by underpricing their offerings. Carolina explains that it will ask video programmers to share their data, to the extent they are legally permitted to, and that such data will help Carolina determine a price ceiling for what it can charge if and when it seeks to offer video dialtone commercially. Carolina also notes that it may provide, and will charge a fee for, non-video programming and non-programming services during the trial, which will permit it to gather market data regarding the provision of these services.[24] Finally, Carolina notes that the Commission has previously allowed US West not to charge video programmers during its technical trial in Omaha, Nebraska.[25]

16. In reply, NCTA states that it only objects to the provision of free carriage to programmers during the market trial, and not during the technical trial. Both NCTA and NCCTA argue that the purpose of a market trial is not to enable customer programmers to determine whether there will be demand by subscribers for their programming services, but rather to enable Carolina to determine whether there is sufficient demand by customer programmers for Carolina's video dialtone transmission service. NCTA questions what programmers would learn from this market trial that they have not already learned from previous trials. NCTA also observes that no programmers have filed in support of this market trial, even though they are the intended beneficiaries. Both also dispute Carolina's reliance on the Commission's grant of the US West trial as a relevant precedent for offering video programmers carriage free of charge. They note that in the US West trial, free service was only to be provided during the 6-month technical trial, not during the subsequent market trial, while Carolina intends not to charge for the entire two-year trial period. NCCTA also argues that the US West test was much smaller (based on homes passed as a percentage of the subscriber base) than the Carolina trial.[26]

17. In an *ex parte* letter filed on December 14, 1994, Carolina reiterates that it is proposing both a technical trial and a market trial. It states that video programmers will not be charged during the technical trial, but that when the technical phase of the trial is satisfied, Carolina will, upon proper notification to the Commission, assess charges for the remainder of the trial.[27]

DISCUSSION

18. The Communications Act requires the Commission "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide" communications infrastructure.[28] The Commission also has a mandate under the Act to encourage technological innovation in communications and to expedite the introduction of new technology subject to other public interest considerations.[29] Significantly, in the Second Report and Order, the Commission found that it is in the public interest to encourage trials of video dialtone technology in order to fulfill its goal of promoting efficient investment in the national telecommunications infrastructure.[30]

19. We conclude that Carolina's application is a *bona fide* proposal for a technical and marketing trial of video dialtone facilities. The Commission has repeatedly declined to set fixed standards regarding the size or duration of video dialtone proposals, but rather has found that a case-

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[21] NCCTA Pet. at 7-10; NCTA Pet. at 3.
[22] NCTA Pet. at 3-4, 15; NCCTA Pet. at 10.
[23] Carolina Reply at 2.
[24] *Id.* at 2-3.
[25] *Id.* at 3-4 (citing US West Communications, Inc., 9 FCC Rcd 184, 188 para. 24 (1993) (*US West Trial*).
[26] NCCTA Reply at 4, Exh. A at 5 n.16; NCTA Reply at 3.
[27] Letter from Warren D. Hannah, Director, Federal Regulatory Relations, Sprint to William F. Caton, Acting Secretary, Federal Communications Commission (Dec. 14, 1994).
[28] 47 U.S.C. § 151.
[29] 47 U.S.C. § 151, 157, 218.
[30] 7 FCC Rcd at 5836, para. 105; *see VDT Recon Order* at para. 3.

by-case review better serves the public interest.[31] Moreover, the Commission has stated its preference not to interfere with carriers' decisions regarding technologies or services. Rather, it has stated that "through the trial process, carriers can be given a certain amount of flexibility to explore the commercial and technical viability of video dialtone."[32] We find that a trial size of 1,000 homes is reasonable.[33] We also conclude that a two-year trial period is reasonable, given that half of the homes Carolina seeks to serve have not yet been constructed. We impose certain conditions on Carolina's authorization that are intended to protect telephone ratepayers and trial participants. To this end, we will require Carolina to inform video programmers, video dialtone subscribers, and all other participants in this trial that it is conducting a trial of video dialtone services, that the trial is limited to two years, and that Carolina, if it wishes to continue to offer video dialtone service on a commercial basis, must seek Commission approval.[34]

20. In its *US West Trial* decision, the Commission permitted US West to provide video dialtone service to programmers at no charge during its technical trial, explaining that "the uncertainties of a trial posed by untested network components does not necessarily lend itself to charging for trial services."[35] Under that same rationale, we will permit Carolina to provide free carriage to video programmers during the technical stage of this trial. As Carolina has now stated that it will assess charges to programmers once the technical phase of the trial is completed, there is no need for us to consider whether Carolina could justify free carriage during the market phase of its trial. Rather, Carolina has agreed to notify the Commission when the technical phase of its trial is satisfied, and will then charge programmers for the remainder of the trial. Based on the trial authorizations we have already granted, we presume that twelve months is a reasonable period within which to compete a video dialtone technical trial. For this reason, we direct Carolina to report to the Chief, Common Carrier Bureau, nine months from the date it starts its technical trial, that it will be prepared to file a tariff to permit its marketing trial to begin one year from the date that its technical trial begins or to explain why its technical trial must continue beyond one year. The rates, terms, and conditions for the provision of video dialtone service during the second year of the trial will be governed by tariff.

2. Economic Justification

Comments

21. NCTA and NCCTA both argue that Carolina has provided insufficient information about its proposed video dialtone service to demonstrate that it is economically feasible and a prudent investment. NCCTA states that it cannot determine the reasonableness of the investment and operating costs for Carolina's proposed video dialtone system because Carolina's data are 1) excessively aggregated, 2) fail to account for annual costs,[36] and 3) fail to deal adequately with common costs. It also criticizes Carolina for failing to provide revenue information, and asserts that Carolina's video dialtone trial will face a revenue deficiency of about $1.5 million per year. NCCTA fears that video dialtone service providers will use their monopoly revenues from telephony to cross-subsidize their video dialtone services. NCTA states that Carolina has not explained how it intends to pay for the cost of its trial, particularly given that it proposes to offer free carriage to programmers. NCTA urges that Carolina not be permitted to impose the cost of its trial on ratepayers for other services. NCTA also charges that Carolina fails to include the cost of digital equipment in its cost estimates.[37]

22. NCCTA charges that Carolina has not provided the information necessary to determine the reasonableness of its proposed allocation of common costs to video dialtone service. While NCCTA acknowledges that Carolina proposes to use Part 36 as a guide in making its allocations of the cost of common fiber plant, pedestals, and drops, it charges that Carolina has not identified the key components of its proposed common cost allocation scheme, the installed costs of common plant, the proportion of the plant to be employed for video dialtone service, the manner in which overhead expenses will be attributed to the video dialtone service, or the share of the costs to be allocated to video dialtone service. Both NCCTA and NCTA criticize Carolina's allocation of fiber based on percentage of fiber strands used for video dialtone and the allocation of half the cost of pedestals and drops, asserting that neither allocation is specifically authorized in Part 36 of the Commission rules. NCTA argues that "there is no principled way to allocate joint and common costs." NCTA urges the Commission to adopt video-dialtone specific cost allocation and anti-discrimination procedures in a rulemaking proceeding, rather than addressing these issues in the Section 214 authorization and tariff review processes.[38]

23. In response, Carolina states that it will follow the new accounting safeguards adopted in the *VDT Recon Order*, and that Carolina will "pay for this trial to the extent revenues derived from the trial do not cover costs."[39] Carolina also states that its $5 million cost is considerably less than the $35 million cost of the US West trial, which the Commission felt US West could absorb without jeopardizing the interests of telephone customers. Carolina states that it will file any revisions to its Cost Allocation Manual that may be required for non-regulated components of the video dialtone service. In allocating common costs, it states that it followed the guidance of 47 C.F.R. Section 36.153 to assign the cost of cable on the basis of conduct cross sections, *i.e.*, strands. Furthermore, it states that it allocated all of that portion of costs to the interstate jurisdiction because the Commission provided for exclusive interstate jurisdiction over video services at the time of its applica-

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[31] *See, e.g.*, The Southern New England Telephone Co., FCC 97-297, released Nov. 22, 1994, (*SNET Trial)* at para. 12; *US West Trial* at 188 para. 22.

[32] *SNET Trial* at para. 38.

[33] *See, e.g., US West Trial* at 188 (approving technical trial of 2,500 and market trial of 60,000).

[34] This is consistent with our previous orders. *See, e.g., SNET Trial*, at para. 13.

[35] *US West Trial*, at 188 n.56.

[36] NCCTA argues that Carolina's annual costs could be close to $700,000 over the two-year period of the trial.

[37] NCCTA Pet. at 10-17; NCTA Pet. at 4-5, 6.

[38] NCCTA Pet. at 12; NCTA Pet. at 6-8.

[39] Carolina Reply at 5.

tion. It promises to modify its allocations if it develops any intrastate offerings. Carolina also explains that Attachment C of its application includes $180,000 for material costs and $63,000 for labor costs relating to digital equipment.[40]

24. NCTA responds to these claims by asserting that existing regulations will not adequately protect against cross-subsidies and challenging Carolina's contention that its facilities will not be used in the provision of intrastate service. NCTA argues that Carolina will be providing both intrastate telephony and video dialtone services over its integrated facilities, and therefore must allocate some costs to the intrastate jurisdiction. NCCTA reiterates its view that Carolina's application provides insufficient information to establish the economic justification (for its proposed investment.)[41]

DISCUSSION

25. Petitioners ask the Commission to hold the application to a level of scrutiny and examination normally reserved for applications for commercial deployment of video dialtone service. Carolina proposes to conduct a trial involving only 1,000 homes for two years. Because of the experimental, limited nature of Carolina's proposal, we find that it is in the public interest to subject the economic support accompanying this trial application to a less exacting level of scrutiny than would apply to an application for permanent, commercial video dialtone service.[42] We do this, in part, because any shortfall between revenues recouped and costs expended for a video dialtone trial will ultimately be borne by the carrier's shareholders. Regarding NCTA's request for a rulemaking proceeding to address video-dialtone specific cost allocation and anti-discrimination procedures, we note that we rejected this request in the *VDT Recon Order*.[43]

26. We note that as of year end 1992, Carolina's total stockholders' equity exceeded $139 million and its net revenues for 1992 were more than $72 million.[44] Carolina represents its total costs for the trial to be approximately $5 million. Even if we accept NCCTA's estimate that Carolina's application omitted an additional $700,000 in annual costs over the two-year trial, the total risk Carolina would assume is less than $6 million. We do not find that the estimated cost of the trial justifies denial of the application. Carolina has expressly agreed to cover its costs out of its own funds, rather than from ratepayers, to the extent that those costs exceed the revenues it collects from the trial. We conclude that Carolina is capable of absorbing the projected cost of the trial without jeopardizing the interests of telephone customers. We thus find the information provided by Carolina to be a sufficient showing of economic justification for this trial.

27. To ensure that video dialtone costs are not borne by ratepayers of other regulated interstate services, we will require Sprint to segregate all costs incurred in providing trial video dialtone service, including development costs and expenses, into subsidiary accounting records for each Part 32 account and to assign these costs to the video dialtone trial. These costs should include both the direct and shared costs of any facilities, including interoffice fiber, used for the provision of video dialtone service. As we have required for every other video dialtone trial authorization, we require that if these costs, including all incremental costs of video dialtone, are not recovered from future video dialtone services, they must be borne by Carolina and its sole shareholder, Sprint, rather than the ratepayers of other regulated services.[45] We will also require Sprint to create two sets of subsidiary accounting records: one to capture the revenues, investments, and expenses wholly dedicated to the provision of video dialtone, and the other to capture any revenues, investments, and expenses that are shared between video dialtone and the provision of other services. Sprint must file a summary of those records with the Commission on a quarterly basis.[46] Sprint is further required to keep subsidiary accounting records to identify, by each Part 32 account, the amount of plant that is replaced (that is, no longer used and useful) as a result of the deployment of video dialtone plant. In the event that investments made pursuant to this authorization are not deemed used and useful or deemed not to have been prudently incurred in the provision of interstate services, the Commission reserves the right to disallow the recovery of any or all such expenditures from interstate ratepayers. We take no position here concerning Carolina's proposed method for allocating its common costs; this allocation will be evaluated during the tariff review process.

28. The costs of non-common carrier and enhanced services, as well as video customer premises equipment (CPE) offered during the trial must be accounted for in accordance with Part 32 and Part 64 of the rules.[47] We require that, to the extent the accounting treatment of non-regulated components of the video dialtone trial is not already covered by Sprint's cost allocation manual (CAM), Sprint must revise its manual to cover them. All revisions must be filed within thirty days after release of this Order, and sixty days before providing non-regulated services related to video dialtone.[48] At a minimum, in its submission, we require Sprint to list all accounts affected by its provision of non-regulated services associated with its video dialtone trial, and also describe those services. All temporary CAM revisions related to the trial will be subject to public comment and Commission scrutiny. Sprint must file permanent revisions if and when it decides, and is authorized, to offer commercial video dialtone services. We emphasize that our decision here, and the conditions we attach to it, are

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[40] *Id.* at 5-7.

[41] NCTA Pet. at 4-5; NCCTA Reply Ext. at 11.

[42] *See* Puerto Rico Telephone Company, DA 94-1384, released Dec. 5, 1994, at para. 39 (*PRTC Trial); SNET Trial*, at paras. 37, 39; *US West Trial* at 188 n.57; Century Federal, Inc. v. FCC, 846 F.2d 1479, 1481 (D.C. Cir. 1988).

[43] *See VDT Recon Order* at paras. 161-69.

[44] FCC Statistics of Common Carriers 1992/1993 134, 139 (1993).

[45] *PRTC Trial* at para. 41; *SNET Trial* at para. 29; New York Tel. Co., 8 FCC Rcd 4325, 4329 at para. 23 (1993) (*NY Tel Trial);* The Chesapeake & Potomac Tel. Co. of Virginia, 8 FCC Rcd 2313, 2316 para. 13 (1993) (*C&P Trial).*

[46] *VDT Recon Order*, at para. 173. Copies of accounting records should be sent to the Chief, Accounting and Audits Division, Common Carrier Bureau. We note that these requirements are consistent with those imposed in other video dialtone trial authorizations. *See, e.g., PRTC Trial*, at para. 41; *SNET Trial*, at para. 29; *US West Trial; NY Tel Trial; C&P Trial.*

[47] 47 C.F.R. § 63.54(d)(2).

[48] *See* 47 C.F.R. § 64.903(b).

without prejudice to and in no way constrain any action that the Commission may take in later phases of the video dialtone proceeding or any other applicable rulemaking proceeding.

IV. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED, that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and authority delegated to the Chief of the Common Carrier Bureau by Section 0.291(a) of the Commission's rules, 47 C.F.R. §0.291(a), the application of Carolina Telephone & Telegraph Company (File No. W-P-C-6999) IS GRANTED, and the applicant is authorized to construct and operate facilities and equipment to provide a video dialtone trial to approximately 1,000 homes in its Wake Forest, North Carolina service area for a period of two years from the date the system is operational and service is available to at least one end-user subscriber. We instruct Carolina to inform the Secretary of the Commission and the Chief of the Common Carrier Bureau, of the official start date of the technical trial and also of the official start of the marketing trial.

30. IT IS FURTHER ORDERED, that grant of the application for the trial proposed herein IS SUBJECT TO the following CONDITIONS:

a) That Carolina make available a basic common carrier platform offering sufficient capacity to serve multiple video programmers under the same terms and conditions and, as demand increases, undertake all reasonable steps to expand capacity to the extent technically feasible and economically reasonable in the context of this trial.

b) That Carolina notify the Chief, Common Carrier Bureau (with copies to the Chiefs of the Policy and Program Planning Division and the Domestic Facilities Division) within thirty (30) days of becoming aware of a capacity shortfall, or within five (5) days after denying a video programmer access to the video dialtone platform because of capacity limitations, whichever occurs first. If Carolina concludes that expansion of the platform's capacity for the trial is not technically feasible or economically reasonable, it must, at that time, explain in detail the basis for its determination.

c) That the trial be limited to approximately 1,000 residential and business customers, and the technical trial be conducted for a period not to exceed one year.

d) That Carolina inform participants in the trial, including both programmer-customers and video dialtone service subscribers, that Carolina is conducting a trial of video dialtone services, that the trial is limited to two years, and that Carolina may or may not offer video dialtone on a commercial basis after the conclusion of the trial.

e) That Sprint create two sets of subsidiary accounting records for each Part 32 account: one to capture the revenues, investments, and expenses wholly dedicated to the provision of video dialtone, and the other to capture any revenues, investments, and expenses that are shared between video dialtone and the provision of other services. Sprint must file three (3) copies of the summary of those records for public inspection with the Secretary of the Federal Communications Commission on a quarterly basis. Two (2) copies of those summaries must also be served on the Chief, Accounting and Audits Division, Common Carrier Bureau. The Bureau will determine the content and format of these subsidiary accounting records as well as the quarterly reports. Sprint is further required to keep subsidiary accounting records to identify, by each Part 32 account, the amount of plant that is replaced (that is, no longer used and useful) as a result of the deployment of video dialtone plant. In the event that investments made pursuant to this authorization are not deemed used and useful or deemed not to have been prudently incurred in the provision of interstate services, the Commission reserves the right to disallow the recovery of any or all such expenditures from interstate ratepayers.

f) That Sprint file all revisions to its Cost Allocation Manual (CAM) within thirty (30) days after release of this Order, and sixty (60) days before providing non-regulated products or services related to video dialtone. Carolina must also list all accounts affected by its provision of non-regulated services associated with the video dialtone service, and must describe those services.

g) That Carolina not participate in any decisions concerning the selection, packaging, pricing, bundling, or tiering of video programming to end-users, absent prior Commission approval. This authorization does not permit Carolina, either directly or indirectly through an affiliate, to provide video programming directly to its subscribers.

h) That Carolina submit to the Chief, Common Carrier Bureau, at six month intervals during the trial, and within sixty (60) days of the end of the trial, a written report. The report must, among other things:

1) identify the capacity allocated to each video programmer customer and the identity of the programmer-customer;

2) include a statement from each video programmer or other service provider using Carolina's services stating whether that programmer/service provider believes it has been discriminated against by Carolina in any manner;

3) describe the video dialtone technology used during the trial. Carolina must include information on the components of the video dialtone system, the operation of video-on-demand, the quality of the video, the methods of accessing the platform, and the digital technology incorporated into the network and its impact on capacity;

4) to the extent known, evaluate the market for video dialtone service, providing penetration rates on a monthly basis, and describing consumer interest in on-demand video services and consumer willingness to pay for video dialtone service;

5) detail the costs, both direct and common, that Carolina has assigned or allocated to the trial, broken down into subsidiary accounting records; and,

6) include any published commentary of which Carolina is aware regarding the trial.

i) That Carolina report to the Chief, Common Carrier Bureau, nine months from the date it starts its technical trial, that it will be prepared to file a tariff to permit its marketing trial to begin one year from the date that its technical trial begins or to explain why its technical trial must continue beyond one year.

31. IT IS FURTHER ORDERED, that pursuant to Section 214(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 214(c), the grant of Carolina's application to provide video dialtone service is subject, from the date of release of this grant, to the conditions contained herein, and is also subject to any Commission rules or orders that result from any existing or future proceeding or proceedings that address video dialtone cost allocations, jurisdictional separations, and pricing issues. Failure of the Carolina Telephone & Telegraph Company to decline this authorization as conditioned within thirty-one (31) days from its release date will be construed as formal acceptance.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M. H. Wallman
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-35

In the Matter of

Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation — ENF 94-3

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1994; Released: December 29, 1994

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On July 20, 1994, AT&T Corp. ("AT&T") petitioned the Commission to waive application of Section 64.1301 of its rules, 47 C.F.R. § 64.1301, regarding interstate access code call compensation. Specifically, AT&T seeks authority to pay compensation to competitive payphone owners ("PPOs") on a per-call basis, in accordance with the Commission's expressed preference.[1] Six parties filed comments or replies in response to the petition.[2] Only one party, MCI Telecommunications Corporation ("MCI"), opposed the petition. For the reasons discussed below, we grant AT&T's petition and allow it to begin paying per-call compensation on January 1, 1995.

II. BACKGROUND

2. In April 1992, the Commission adopted the *Second Report and Order* in CC Docket No. 91-35, which established a mechanism for interexchange carriers ("IXCs") to compensate PPOs for originating interstate access code calls. The Commission expressed its preference at that time for a per-call compensation mechanism because it would encourage PPOs to place their payphones in locations that are likely to generate the most calls. The Commission found, however, that it was not technically feasible to implement such a mechanism at that time.[3] Instead, in the interests of implementing a compensation mechanism "quickly and at relatively little cost," the Commission adopted on an interim basis a compensation rate of $6 per competitive payphone per month. At the same time, the Commission directed the Chief, Common Carrier Bureau, "to explore whether and how a per-call compensation mechanism might be implemented in the future."[4]

3. The Commission further concluded in the *Second Report and Order* that flat-rate compensation obligations should be limited to those IXCs that both (1) earn annual toll revenues in excess of $100 million, and (2) provide live or automated operator services. The Commission determined that each IXC's share of the monthly charge of $6 per payphone would be computed by calculating its relative share of total toll revenues received by IXCs required to pay compensation, and multiplying that percentage by $6.[5]

III. PETITION FOR WAIVER AND COMMENTS

A. The Petition

4. AT&T seeks waiver of Section 64.1301 of the rules to allow it to pay compensation based on the actual number of access code calls it receives from each competitive payphone. According to AT&T, it is currently upgrading its systems to enable it to pay compensation on individual 10XXX and 1-800 access code calls from competitive payphones not presubscribed to AT&T in equal access areas.[6] It argues that this method of compensation would serve the Commission's objective of implementing a more cost-based approach to compensating PPOs for originating interstate access code calls. AT&T states that grant of its petition would not affect the obligations of other IXCs required to pay flat-rate compensation under Section 64.1301.[7] AT&T further asks the Commission to establish a compensation rate of $.25 per call for all completed interstate and international calls. AT&T claims that this compensation rate is acceptable to both APCC, a national PPO trade association, as well as major state and regional PPO trade associations.[8]

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[1] Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Second Report and Order, 7 FCC Rcd 3251, 3252-53 (1992) (*"Second Report and Order"*). The *Second Report and Order* defines an "access code" as "a sequence of numbers that, when dialed, connects the caller to the [operator service provider ("OSP")] associated with that sequence, as opposed to the OSP presubscribed to the originating line. Access codes include 10XXX in equal access areas and "950" Feature Group B dialing (950-0XXX or 950-1XXX) anywhere, where the three-digit XXX denotes a particular IXC. Some OSPs use an 800 number as an access code." *Id.* at 3251 n.1.

[2] *See* Appendix A for a list of those parties filing comments or replies.

[3] *Second Report and Order*, 7 FCC Rcd at 3252-53.

[4] *Id.* at 3253. The Commission also noted that "[i]f and when sufficient progress is made in this area, we will initiate a new proceeding to make appropriate changes in the compensation mechanism and rate that we adopt herein." *Id.* In the *Reconsideration Order*, adopted in September 1993, the Commission reaffirmed its commitment to establishing a per-call compensation mechanism once it becomes technically feasible: "We continue to believe that a per-call compensation mechanism is preferable to a flat fee per-phone." Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 7151, 7157 (*"Reconsideration Order"*).

[5] *Second Report and Order*, 7 FCC Rcd at 3259.

[6] AT&T Petition at 5. AT&T proposes to continue to pay flat-rate compensation for competitive payphones located in non-equal access areas, which it claims represent less than 5% of all competitive payphones. *Id.* at n.17.

[7] *Id.* at 6. AT&T states that its percentage of interstate toll revenues would continue to be a factor in calculating the flat-rate compensation obligations of other IXCs. However, AT&T states further, its own payment obligations would be satisfied by its payment of per-call compensation to PPOs. *Id.* at 7.

[8] *Id.*

B. Comments and Reply Comments

5. APCC supports AT&T's petition; it contends that per-call compensation is a more equitable approach that sends more appropriate economic signals to the payphone marketplace than per-phone compensation.[9] APCC states that the proposed $.25 rate is acceptable to APCC, provided that AT&T pays that rate for completed intrastate as well as interstate and international access code calls.[10] APCC argues that the $.25 rate is at the lower end of the "zone of reasonableness" established by the Commission's *Second Report and Order* and that a substantially higher rate per-call is justified, but it alleges that it is willing to accept the $.25 rate in order to expedite implementation of per-call compensation.[11]

6. Sprint, Ameritech, and Florida PSC also support AT&T's petition. Sprint supports grant of the requested waiver, provided that the Commission permits other carriers to satisfy their compensation obligations by paying $.25 per access code call in lieu of a flat rate per payphone. Sprint also requests that the Commission not otherwise place its "imprimatur" on the rate of $.25 per call.[12] Ameritech states that AT&T's petition is consistent with the principles and long-term objectives established by the Commission in earlier orders in CC Docket No. 91-35.[13] Florida PSC argues that per-call compensation is "more appropriate" than the existing mechanism.[14]

7. MCI opposes AT&T's petition on the ground that AT&T has failed to demonstrate any special circumstance that would justify exempting it from the per-phone compensation mechanism.[15] MCI argues that the Commission should reexamine its rule rather than grant piecemeal waivers.[16] MCI further contends that, because the rate of $6 per payphone adopted in the *Second Report and Order* was "based on nationwide and payphone industry-wide averages that included equal access and non-equal access areas," the $6 amount "is not an appropriate surrogate for payphones in non-equal access areas only."[17] MCI argues that AT&T's proposal to pay flat-rate compensation only for access code calls placed from competitive payphones in non-equal access areas is not supported by the record evidence developed by the Commission in the rulemaking proceeding to establish the $6 amount.[18] In addition, MCI argues that AT&T fails to demonstrate that the amount of $.25 per call is reasonable and in the public interest.[19] MCI contends that, if it ultimately decides to grant AT&T's petition, the Commission must make clear that the $.25 per-call amount is a negotiated rate with no basis in the record and should not be given precedential effect.[20]

8. Allnet argues that the payphone compensation system needs to be reconfigured to achieve parity between competitive payphones and LEC payphones. It further argues that the LECs, not IXCs, should compensate PPOs on the same basis as the LECs' own payphones are compensated.[21] Allnet contends that because the $.25 per call rate is far below the $.40 per-call amount used to establish the $6 flat rate, the Commission must, if it grants the AT&T petition, reduce the $6 amount by a proportionate amount to $3.75 per phone.[22] Allnet further contends that if the Commission grants the waiver to AT&T, it should extend the waiver to all IXCs, so that other IXCs may implement this compensation scheme at the same time that AT&T is authorized to do so.[23]

IV. DISCUSSION

9. The Commission has consistently expressed its preference for compensating PPOs on a per-call basis for originating interstate access code calls.[24] Since adoption of the payphone compensation mechanism, the Common Carrier Bureau has "monitor[ed] progress in this area and work[ed] with the industry to explore ways of moving to a per-call mechanism."[25] We find that the developments underlying AT&T's petition for waiver represent measurable progress toward this end. Waiver of Commission rules is appropriate only if special circumstances warrant a deviation from the general rule[26] and such deviation serves the public interest.[27] We find that AT&T has shown that special circumstances exist in this case, since, so far as we are aware, it is the only IXC to date that is in the process of converting its facilities to enable it to compensate PPOs on a per-call basis for interstate access code calls placed to AT&T. We also find that AT&T's request for a waiver serves the public interest by encouraging PPOs to place their payphones in locations that are likely to generate the most calls. Accordingly, we grant AT&T a waiver to permit it to begin paying compensation to PPOs on a per-call basis

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[9] APCC Comments at 1-2.
[10] *Id.* at 2.
[11] *Id.* at 3.
[12] Sprint Comments at 2.
[13] Ameritech Comments at 1. Ameritech does not take a position on the per-call compensation amount, other than to state that it should be cost-based. *Id.* It also urges the Commission to investigate the possibility of implementing per-call compensation for local exchange carrier ("LEC") payphones. *Id.* at 2.
[14] Florida PSC Comments at 1-2.
[15] MCI Comments at 3.
[16] *Id.*
[17] *Id.*
[18] *Id.* In the *Second Report and Order*, the Commission identified three reasonable compensation approaches that established a range of reasonable compensation rates. The three approaches were (1) as a surrogate for PPO costs, access charge compensation that a LEC receives for its regulated provision of payphones; (2) as a measure of value to OSPs of receiving access code calls, charges for a transfer by a LEC live operator to an IXC of the caller's choice ("O- transfer service charges"); and (3) AT&T's federally regulated commission rates on calls made from payphones presubscribed to AT&T. For a more detailed discussion of the three compensation approaches, *see Second Report and Order*, 7 FCC Rcd at 3255-57.
[19] *Id.* at 4.
[20] *Id.*
[21] Allnet Reply at 3-4. Allnet proposes that LECs create a single access charge rate element that is assessed in addition to other LEC access charges, but only upon OSPs. *Id.* at 4.
[22] *Id.* at 6. In the *Second Report and Order*, the Commission prescribed a $6 monthly flat rate, which was computed by multiplying the estimated 15 access code calls originated by each competitive payphone each month by a rate of $.40 per call. 7 FCC Rcd at 3257. The $3.75 monthly amount proposed by Allnet is the product of the 15 projected access calls at a rate of $.25 per call. *Id.*
[23] *Id.* at 1-2.
[24] *See* para. 2 and note 4 *supra*.
[25] *Reconsideration Order*, 8 FCC Rcd at 7157.
[26] *Northeast Cellular Telphone Company v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).
[27] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

on January 1, 1995. The obligations of the other IXCs required to pay compensation to PPOs are not affected by our grant of this waiver.

10. MCI is the only party that opposes AT&T's petition. MCI argues first that AT&T has failed to show special circumstances that would justify the grant of a waiver.[28] We disagree. AT&T demonstrates in its petition that it has the ability to implement per-call compensation. To date, no other carrier has shown that it possesses the technical capability to use this compensation mechanism. MCI next argues that AT&T's proposal to continue paying flat-rate compensation for competitive payphones in non-equal access areas would undermine the compensation approaches established for competitive payphones in all areas.[29] We find that AT&T's alternative compensation mechanism for non-equal access area payphones would maintain the *status quo*. In addition, according to AT&T,[30] the flat-rate compensation mechanism would apply to only a very small fraction of existing competitive payphones. Finally, MCI argues that the $.25 per-call rate has basis in the record.[31] We find that the $.25 per-call rate is reasonable in light of the Commission's previous findings in this proceeding. In the *Second Report and Order*,[32] the Commission concluded that it would be reasonable to base compensation to PPOs for interstate access code calls on the interstate tariffed charges for LEC 0- transfer service. The Commission further found that the LEC charges range from a low of $.22 per call to a high of $.45 per call.[33] We further note that no PPO has challenged the proposed rate as unreasonable.

11. Both Allnet and Sprint request that the waiver be granted to all IXCs that have the ability to pay per-call compensation to PPOs.[34] Grant of a generic waiver to all IXCs that possess this technical capability is beyond the scope of this proceeding. A petition for a rulemaking to move the industry to a per-call compensation mechanism has been filed, however, and Commission action on the petition is pending.[35]

12. MCI and Sprint argue that the Commission should make clear that the $.25 per-call rate has been negotiated between parties and does not otherwise bear its endorsement.[36] We agree. As stated above, we find that the $.25 per-call rate is within the range of reasonable compensation rates established by the Commission's *Second Report and Order*. We, therefore, grant AT&T a temporary waiver to pay compensation at this rate until the Commission has an opportunity to determine the appropriate per-call rate in a rulemaking of general applicability. Because the waiver merely allows AT&T to pay its existing compensation obligations on a per-call basis and does not change the respective obligations of the other IXCs, we decline Allnet's suggestion that we recalculate the overall $6 flat-rate compensation amount to reflect a lower per-call compensation rate.

13. Allnet also urges the Commission to reconfigure the payphone compensation system to achieve parity between competitive payphones and LEC payphones.[37] Similarly, Ameritech requests that the Commission investigate the possibility of implementing per-call compensation for LEC payphones.[38] We decline to address both arguments, because they are beyond the scope of this limited waiver proceeding.

14. As a condition to our granting AT&T a temporary waiver, we direct AT&T to file a report with the Chief, Common Carrier Bureau at the end of each quarter specifying the total amount paid to PPOs under the per-call compensation mechanism, the number of compensable calls received by AT&T, and the number of PPOs receiving per-call compensation. We also direct AT&T to report the nature and ultimate resolution of any compensation disputes between it and any PPOs.

V. CONCLUSION

15. We conclude that AT&T has demonstrated good cause for grant of a waiver of Section 64.1301 of the Commission's rules. Accordingly, we authorize AT&T to pay, as of January 1, 1995, compensation to PPOs at the rate of $.25 per interstate access code call, pending further action by the Commission in this proceeding regarding the appropriate permanent compensation mechanism. We further conclude that the obligations of the other IXCs required to pay flat-rate compensation will not be affected by grant of this waiver.

VI. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c), and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the Petition of AT&T for waiver of Section 64.1301 of the Commission's rules, 47 C.F.R. §§ 64.1301, IS GRANTED to the extent stated herein.

17. IT IS FURTHER ORDERED that this waiver shall become effective on January 1, 1995.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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[28] MCI Comments at 3.
[29] *Id.*
[30] *See* note 6, *supra*.
[31] *Id.* at 4.
[32] *See* note 16, *supra*.
[33] *Second Report and Order*, 7 FCC Rcd at 3256.
[34] Allnet Reply at 1-2; Sprint Comments at 2.
[35] *See* Petition of the American Public Communications Council and State Payphone Associations to Initiate, on an Expedited Basis, A Rulemaking Proceeding to Amend Section 64.1301 of the Commission's Regulations to Establish Per-Call Compensation for Access Code Calls, CC Docket No. 91-35, filed July 19, 1994.
[36] MCI Comments at 4; Sprint Comments at 2.
[37] Allnet Reply at 3-4.
[38] Ameritech Comments at 2.

APPENDIX A

Parties Filing Comments in This Proceeding

Petition for Waiver
AT&T Corp. ("AT&T")

Comments
American Public Communications Council ("APCC")
Ameritech Operating Companies ("Ameritech")
Florida Public Service Commission ("Florida PSC")
MCI Telecommunications Corporation ("MCI")
Sprint Communications Co. ("Sprint")

Replies
Allnet Communications Services. Inc. ("Allnet")
APCC
AT&T

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-157

In the Matter of

Bell Atlantic Telephone Companies
Tariff F.C.C. No. 1,
Transmittal No. 690

NYNEX Telephone Companies
Tariff F.C.C. No. 1,
Transmittal No. 328

Pacific Bell Tariff F.C.C. No. 128,
Transmittal No. 1738

US West Communications,
Transmittal No. 550

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1994; Released: December 29, 1994

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 1, 1994, Bell Atlantic Telephone Companies (Bell Atlantic) and NYNEX Telephone Companies (NYNEX) filed the above-captioned transmittals to increase their rates for interstate access.[1] The supporting documentation accompanying these transmittals shows that the carriers have adjusted their price cap index (PCI) levels upward to reflect exogenous treatment for the costs of certain Other Post-Employment Benefits (OPEBs). The changes in OPEB costs of these two local exchange carriers (LECs) are caused by their implementation of the Statement of Financial Accounting Standards - 106 (SFAS-106), as previously required by this Bureau.[2] The above-captioned transmittals filed by PacificBell (Pacific) and US West Communications (US West) do not propose any changes to their tariffed rates, terms or conditions for interstate services.[3] Rather, they state that the purpose of these transmittals is to advise the Commission that they have revised their PCI levels upward to reflect exogenous treatment for certain OPEB costs.

2. These transmittals represent the first proposals by LECs to adjust their PCI levels to reflect their implementation of SFAS-106 since the Court of Appeals decision in *Southwestern Bell Telephone Company v. FCC*.[4] In that case, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded an FCC Order in which the Commission concluded that increases in booked OPEB costs caused by the implementation of SFAS-106 were not eligible for exogenous treatment.[5] Although the Court directed the FCC to grant exogenous treatment to such costs, it remanded the proceeding to the Commission to calculate the specific amount of OPEB increases that are eligible for exogenous treatment.

3. In this Order, the Common Carrier Bureau (Bureau) suspends the tariffs filed by Bell Atlantic and NYNEX for one day, initiates an investigation and imposes an accounting order. We will designate issues for investigation, name parties to the investigation and establish a pleading cycle for the investigation in a subsequent Order. We also dismiss the US West and Pacific transmittals, because we conclude that they are procedurally deficient.

II. BACKGROUND

4. The treatment of changes in booked OPEB expenses attributable to the implementation of SFAS-106 by LECs under price cap regulation has been the subject of extensive proceedings before the Commission. To understand the context in which we view the instant transmittals, it is useful to summarize briefly those prior proceedings.

A. SFAS-106

5. In December 1990, the Financial Accounting Standards Board (FASB) adopted the Statement of Financial Accounting Standards - 106 (SFAS-106), "Employers Accounting for Post retirement Benefits Other Than Pensions." For those companies subject to generally accepted accounting principles (GAAP), SFAS-106 established new financial accounting and reporting requirements for accounting periods beginning after December 15, 1992, for any employer offering postretirement benefits other than pensions to its employees. OPEBs typically consist of health and dental care benefits and life insurance.

6. Before adopting SFAS-106, carriers accounted for OPEBs on a "pay-as-you-go" or cash basis, recognizing the amounts actually paid on behalf of employees in the current accounting period, the so-called "ongoing amounts." SFAS-106 now requires companies to account for OPEBs on an accrual basis, treating OPEBs as a form of deferred compensation earned by employees during their working years. Thus, the costs of OPEBs are recognized during the years the benefits are earned, rather than during the years when the amounts of the benefits are actually paid by the company.

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[1] *See* Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690 (filed Sept. 1, 1994); NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328 (filed Sept. 1, 1994).

[2] Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "employers Accounting for Postretirement Benefits Other Than Pensions," CC Docket No.92-101, 8 FCC Rcd 1024 (1993) (*OPEB Order*).

[3] Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1738 (filed Sept. 1, 1994); US West Communications, Transmittal No. 550 (filed Oct. 14, 1994).

[4] *Southwestern Bell Telephone Company v. FCC*, 28 F.3d 165 (D.C. Cir. 1994).

[5] *See OPEB Order* at 1031.

7. In addition to the change from cash-based to accrual accounting, SFAS-106 requires companies to recognize on their books the amount of their unfunded obligation for OPEBs to retirees and to active employees existing as of the date of their adoption of SFAS-106. This unfunded obligation reflects the amount that a company would have accrued on its books as of the effective date of the accounting change if it had been operating under the accrual method and is referred to as the "transitional benefit obligation" (TBO). SFAS-106 permits companies whose benefits plans have active participants either to recognize the TBO as an immediate expense or to defer and to amortize it over the average remaining benefits period of active plan participants. If the average remaining service period is less than 20 years, the employer may elect to use a 20-year period.

8. Since 1985, the Commission has followed a policy of conforming regulatory accounting for carriers to GAAP, including new FASB standards, unless adoption of the principle or practice conflicts with the Commission's regulatory objectives. *See* Section 32.16 of the Commission's rules, 47 C.F.R. § 32.16. In December 1991, the Bureau issued an Order approving the requests of two local exchange carriers (LECs) to adopt SFAS-106-type accounting for OPEBs, on or before January 1, 1993.[6] The Bureau declined, however, to allow carriers to adopt the FASB option of immediately recognizing the TBO, because the amounts involved were so large that booking them as one-time expenses would have distorted the LECs' earnings during the period affected. Instead, the Bureau authorized the carriers to use the other SFAS-106 option of amortizing the TBO expense either over a 20-year period or over the average remaining service period of active plan participants.[7]

B. Price Caps and Changes in GAAP

9. In its price cap decisions,[8] the Commission replaced cost-plus rate of return regulation with an incentive-based system of regulation that rewards carriers whose performance exceeds a benchmark measure of efficiency improvements. The benchmark, known as the price cap index or PCI, is adjusted each year based on inflation in the economy (Gross National Product Price Index, or GNP-PI), minus a productivity factor.[9] The productivity factor for LECs is set to reflect the historical productivity growth of the telephone industry, which has exceeded the productivity of the economy as a whole, plus a 0.5 percent Consumer Productivity Dividend. Carriers that are able to generate productivity gains in excess of the target are rewarded with higher earnings than they could achieve under rate-of-return regulation. Price cap carriers are permitted to retain earnings in excess of the rate of return that the Commission has prescribed for rate-of-return carriers. Carriers also benefit because price cap regulation provides increased rate flexibility and is simpler to administer. Ratepayers benefit because the benchmark is designed to decrease rates relative to inflation at a faster pace than rates have historically decreased.

10. Under price caps, most increases and decreases in a carrier's cost of providing regulated service are treated as "endogenous" changes, *i.e.*, they do not result in adjustments to the carrier's PCI. The Commission, however, has identified certain cost changes, triggered by administrative, legislative, or judicial action that are beyond the control of the carriers, that should result in an adjustment to the PCI.[10] The Commission concluded that failing to recognize these cost changes by adjusting the PCI would either unjustly punish or reward the carrier by treating them as changes in the carrier's level of efficiency.[11] Accordingly, the Commission found that those types of cost changes should be treated "exogenously" in order to ensure that price cap regulation did not lead to unreasonably high or unreasonably low rates.

11. The Commission further determined, however, that not all changes beyond the carrier's control should be treated exogenously. For example, a general change in tax rates is outside the carrier's control, but will be reflected in the national GNP-PI component of the price cap formula.[12] Exogenous treatment of the tax change would thus unfairly "double count" its impact, once in the GNP-PI, and again as an exogenous cost. The Commission concluded that only changes that "uniquely or disproportionately affect LECs" would be considered for exogenous treatment.[13]

12. Section 61.45(d) of the Commission's rules, 47 C.F.R. § 61.45(d), lists the types of cost changes that may be eligible for exogenous treatment under the Commission's price cap plan. Examples of these cost changes include reserve deficiencies, changes in the Uniform System of Accounts (USOA) permitted or required by the Commission, changes in the Separations Manual, and changes in the level of certain support payments and receipts.[14]

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[6] *See* Southwestern Bell Corporation, GTE Service Corporation, Notification of Intent To Adopt Statement of Financial Accounting Standards, No. 106, Employer's Accounting for Postretirement Benefits Other Than Pensions, 6 FCC Rcd 7560 (Com. Car. Bur. 1991).

[7] *Id. See also* Uniform Accounting for Postretirement Benefits Other Than Pensions in Part 32, (May 4, 1992) (*RAO Letter 20*).

[8] *See* Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice, 4 FCC Rcd 2873 (*AT&T Price Cap Order*), *modified on recon.*, 6 FCC Rcd 665 (1991) (*AT&T Price Cap Reconsideration Order*); Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *further recon.*, 6 FCC Rcd 4524 (1991) (*ONA Part 69 Order*), *second further recon.*, 7 FCC Rcd 5235 (1992), *aff'd. National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

[9] The LEC price cap rules require carriers to elect a productivity offset of either 3.3 percent or 4.3 percent. Election of the higher productivity offset lowers the price cap, thereby benefiting ratepayers. Election of the higher offset also permits the LEC to retain a larger share of its earnings, thereby benefitting the LEC if it can increase its productivity. *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2641.

[10] *LEC Price Cap Order*, 5 FCC Rcd at 6807; *citing AT&T Price Cap Order*, 4 FCC Rcd at 3187.

[11] *LEC Price Cap Order*, 5 FCC Rcd at 6807.

[12] *Id.* at 6808.

[13] *Id.*

[14] Section 61.45(d) also considers exogenous the reallocation of investment from regulated to nonregulated activities, any tax law changes and other extraordinary exogenous cost changes as the Commission may permit or require, retargeting of the PCI to the level specified by the Commission for carriers whose base year earnings are below the level of the lower adjustment mark (10.25 percent), and inside wire amortizations.

C. The OPEB Order

13. After the Bureau, pursuant to delegated authority, required AT&T and the LECs to conform their regulatory accounting practices to SFAS-106, several LECs subject to price cap regulation filed tariff transmittals in 1992 that sought permission to treat the change in OPEB costs exogenously.[15] The Bureau suspended these transmittals and set them for investigation.[16] All price cap-regulated LECs were made subject to this investigation. On January 22, 1993, the Commission adopted an Order terminating the investigation and denying the LECs' requests for exogenous treatment of OPEBs.[17]

14. The *OPEB Order* noted that the Commission previously had concluded that not all changes in GAAP are automatically entitled to exogenous treatment.[18] The *OPEB Order* also stated that the burden of proof is on the carrier seeking exogenous treatment and outlined the two-pronged test used to determine whether the Commission should permit GAAP changes to be treated exogenously.[19] The first prong requires the carrier to show that the cost change is not within its control. The second prong requires the carrier to show that the cost change has a "unique or disproportionate effect" on LECs, that is not already reflected in the price cap formula, for example, in the general inflation factor.[20]

15. As discussed above, the two types of OPEB amounts are "ongoing" amounts and "transitional benefit obligation" or "TBO" amounts. Ongoing amounts represent the accrual accounting of OPEBs that are booked when the employee earns the benefits. The TBO amounts represent the unfunded, accrued OPEBs existing as of the date the company implemented accrual accounting under SFAS-106. The *OPEB Order* addressed the two types of OPEBs separately.

16. With respect to the OPEB amounts accruing after the SFAS-106 change -- the ongoing amounts -- the Commission found that LECs have substantial control over the level of OPEB expenses. Accordingly, the *OPEB Order* found that the LECs failed the first prong of the exogenous cost test for going-forward amounts. With regard to the TBO amounts, the Commission stated that it did not have to resolve the control issue because the LECs failed to meet their burden of proving that the amounts claimed as the TBO had not already been accounted for in the GNP-PI -- the second prong of the test. Finally, the Commission indicated that it was not foreclosing further consideration of exogenous treatment of the TBO amounts based on a better and more complete record, suggesting the annual 1993 access tariff filings as a possible forum for such consideration.[21]

17. The LECs based their claim that implementation of SFAS-106 had a "unique or disproportionate effect" on LECs on one of two different economic studies: one prepared for the United States Telephone Association by Godwins, a research consulting firm; and one prepared for Pacific and Rochester Telephone Corporation (Rochester) by National Economic Research Associates, Inc. (NERA).[22] All of the price cap LECs except Rochester and Pacific submitted the Godwins Study in support of their direct cases in the *OPEB Order*. Rochester and Pacific submitted the NERA Study in support of their direct cases. Because Bell Atlantic, NYNEX and US West rely on the Godwins Study and Pacific relies on the NERA Study to support the PCI adjustments proposed in the instant transmittals, we summarize briefly the findings of those studies and the Commission's analysis of their conclusions.

18. The Godwins Study claims that OPEB costs are higher for LECs than other companies and that approximately 85 percent of the LECs' OPEB costs are not reflected in the GNP-PI. Godwins asserts that telephone company employees are older, leave the company before retirement less often, and retire at a younger age than employees in the economy as a whole. Godwins also contends that the LECs: have a higher retiree-to-employee ratio; offer coverage to a higher proportion of employees; and, have higher per-unit labor costs. The Godwins Study also claims that LEC labor costs represent a lower percentage of their total operating costs than those represented in the economy as a whole. Finally, Godwins assumes that LECs have pre-funded some of their SFAS-106 obligation while the economy as a whole has not. In light of these significant differences, the Godwins Study concludes that most of the impact of the change in accounting for OPEB costs will not be reflected in the GNP-PI.

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[15] *See* Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 497 (filed Feb. 28, 1992); US West Communications, Inc. Tariff F.C.C. Nos 1 and 4, Transmittal No. 246 (filed Apr. 3, 1992); and Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1579 (filed Apr. 16, 1992).

[16] Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Postretirement Benefits Other Than Pensions," CC Docket No. 92-101, *Order of Investigation and Suspension*, 7 FCC Rcd 2724 (Com. Car. Bur. 1992). The Bureau designated the following issues for investigation: (1) whether the LECs had borne their burden of demonstrating that implementing SFAS-106 results in an exogenous cost change under the Commission's price cap rules; and (2) if these cost changes were treated as exogenous: (a) should costs associated with implementation of SFAS-106 prior to January 1, 1993 (when the accounting change becomes mandatory) be treated as exogenous; (b) were the assumptions made by the individual LECs in calculating these costs reasonable; (c) given these assumptions, had the individual LECs correctly computed the exogenous cost changes; and (d) were the individual LEC allocations of these costs among the price cap baskets consistent with Commission rules. *Id.* at 2725-26.

[17] Bell Atlantic, US West and Pacific Bell were ordered to file tariff revisions removing the OPEB material. *OPEB Order* at 1037.

[18] *OPEB Order*, 8 FCC Rcd at 1026 *citing AT&T Price Cap Reconsideration Order*, 6 FCC Rcd at 674; *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2663-65. The Commission concluded in the *AT&T Price Cap Order* that GAAP changes should not be treated in the same manner as USOA changes, which are always given exogenous treatment, for two primary reasons: GAAP changes are adopted by the FASB, while the Commission adopts USOA changes; and GAAP changes may or may not be reflected in GNP-PI. *AT&T Price Cap Order*, 4 FCC Rcd at 3017.

[19] *OPEB Order*, 8 FCC Rcd at 1026 and 1033.

[20] *Id.* at 1033.

[21] *Id.* at 1037.

[22] United States Telephone Association, "Post-Retirement Health Care Study Comparison of TELCO Demographic and Economic Structures and Actuarial Basis to National Averages" (1992) (Godwins Study); National Economic Research Associates, Inc., "The Treatment of FAS-106 Accounting Changes Under FCC Price Cap Regulation" (1992)(NERA Study).

19. The NERA Study divides the U.S. economy into two sectors: a "cost-plus" (price regulated) sector, and all other industries. NERA assumes that only the cost-plus sector will pass through the effects of SFAS-106 in its prices; the other sector of the economy is assumed to be already reflecting the effects of SFAS-106 in its prices. The NERA Study concludes that SFAS-106 will increase GNP-PI by 0.12 percent but will increase costs to LECs by 1.1 percent. Thus, according to NERA, approximately 7 percent of the effect of SFAS-106 on the price cap LECs will be recognized in the GNP-PI, and the remainder should be allowed as an exogenous adjustment.

20. The *OPEB Order* stated that the two studies appear to be facially inconsistent. NERA assumed that companies factored accrued OPEB costs into their prices in the past, while Godwins asserted that they only recently began to do so. The *OPEB Order* also indicated that the LECs failed to address several possible sources of double-counting OPEB costs. For all of these reasons, the Commission concluded that neither study demonstrated that SFAS-106 has a "unique or disproportionate effect" on LECs within the meaning of the test for exogenous treatment.[23]

21. The price cap LECs sought judicial review of the *OPEB Order* in the U.S. Court of Appeals for the District of Columbia Circuit. On July 12, 1994, the Court reversed and remanded the Commission order, finding that price cap LECs were entitled to treat changes in OPEB costs attributable to the implementation of SFAS-106 exogenously.[24] The Court concluded that this cost change was beyond the control of the LECs since the Commission has required the carriers to follow this accounting practice in recording OPEB costs in their regulated books of account.[25] The Court further found that the Commission had not justified its rejection of the Godwins and NERA studies.[26] The Court remanded the proceeding so that the Commission could address the issues that had been designated for investigation in the review of the LEC tariffs that proposed rate changes to reflect the increased OPEB expenses.[27] The FCC Did not reach those issues in its initial *OPEB Order* because it ruled against the LECS on the threshold eligibility issue.

22. Thus, while it is clear after the Court of Appeals decision that changes in LEC OPEB costs caused by the implementation of SFAS-106 are eligible for exogenous treatment, other issues remain that concern the specific adjustments that LECs may make to their PCI levels to reflect the cost change. Some of these issues are raised by the instant transmittals, such as whether OPEB cost increases caused by a LEC's implementation of SFAS-106 prior to January 1, 1993 are eligible for exogenous treatment. To the extent that the issues raised by the instant transmittals are not resolved by the Commission on remand of the *OPEB Order*, we will address them in our examination of these tariff filings.

D. 1993 Annual Access Tariffs and Investigation

23. In their 1993 annual access filings, the Ameritech Operating Companies (Ameritech), Bell Atlantic, BellSouth Telecommunications, Inc. (BellSouth), GTE System Telephone Companies (GSTC), GTE Telephone Operating Companies (GTOC), the Lincoln Telephone and Telegraph Company (Lincoln), NYNEX, Rochester, Southern New England Telephone Company (SNET), Southwestern Bell Telephone Company (Southwestern) and US West Communications, Inc. (US West) sought exogenous treatment of transitional benefit obligation amounts.[28] In the 1993 annual filings, the LECs seeking exogenous treatment for OPEBs limited their requests to the incremental costs associated with the implementation of SFAS-106 for employees retiring before January 1, 1993, the date of SFAS-106 implementation. These exogenous costs total more than $200 million. These carriers did not, in their 1993 annual access filings, seek exogenous treatment for TBO amounts covering then current employees.

24. On June 23, 1993, the Common Carrier Bureau suspended the 1993 annual access tariffs for one day and initiated an investigation.[29] The investigation is pending before the Commission.

III. DISCUSSION

A. Bell Atlantic and NYNEX Tariff Transmittals

1. Description

25. In Transmittal No. 690, Bell Atlantic seeks exogenous treatment of TBO amounts for its active employees and for ongoing SFAS-106 amounts, less pay-as-you-go amounts already included in rates and Voluntary Employee Benefits Association (VEBA) funded amounts, from January 1, 1991 through June 30, 1995.[30] Bell Atlantic proposes to increase its PCI and adjust its rates to recover $6.5 million of exogenous costs through rate increases charged between October 16, 1994[31] and June 30, 1995.

26. In Transmittal No. 328, NYNEX seeks exogenous treatment of $38 million, consisting of two discrete components. In its 1993 annual access filing, NYNEX sought exogenous treatment of $8.07 million for TBO amounts accrued for retirees only. In its current filing, NYNEX seeks rate increases to cover the remaining OPEB costs of $20.98 million that were not covered by its 1993 annual access tariff filing, including TBO amounts for current

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[23] *Id.* at 1035.

[24] *Southwestern Bell Telephone Company v. FCC*, 28 F.3d 165 (D.C. Cir. 1994).

[25] *Id.* at 169-71.

[26] *Id.* at 171-72.

[27] *See* note 16, *supra*.

[28] *See* Ameritech Tr. 702 Description and Justification (D&J) at 10; Bell Atlantic Tr. 565 D&J at 4-21 - 4-22; BellSouth Tr. 105 D&J at A-11 - A-14; GSTC Tr. 38 D&J at 10; GTOC Tr. 781 D&J at 10; Lincoln Tr. 72 D&J at 15-16; NYNEX Tr. 176 D&J at 53-57; Rochester Tr. 187 D&J at 1-9; Southwestern Tr. 2271 D&J at 3-4 - 3-5; and US West Tr. 345 D&J at 2-14 -2-17.

[29] 1993 Annual Access Tariff Filings, CC Docket No. 93-193, National Exchange Carrier Association, Transmittal No. 556, Universal Service Fund and Lifeline Assistance Rates, CC Docket No. 93-123, GSF Order Compliance Filings, Bell Operating Companies Tariffs for the 800 Service Management System and 800 Data Base Access Tariffs, CC Docket No. 93-129, *Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation*, 8 FCC Rcd 4960 (Com. Car. Bur. 1993).

[30] VEBA trusts are funding vehicles for, among other benefits, OPEBs, that generally forbid removal or transfer of funds except for the purpose for which they were established. *See* 26 U.S.C. § 501(c)(a).

[31] Bell Atlantic Transmittal 690 was originally filed on 45 days' notice and was scheduled to take effect on October 16, 1994.

employees and ongoing OPEB costs. In addition, NYNEX requests a "make-whole adjustment"[32] to recover OPEB costs of $37.59 million incurred during the period January 1, 1993 to October 16, 1994 -- the date that this transmittal was originally scheduled to take effect. NYNEX plans to recover this amount over 26.5 months and proposes to adjust its PCI and revise its rates to recover $17.02 million over the initial 12 months.

2. Pleadings

27. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate the transmittals of Bell Atlantic and NYNEX[33] on September 16, 1994. MCI argues that the Commission's *RAO Letter 24*[34] bars recovery of OPEBs until those costs are actually incurred.[35] The LECs respond that *RAO Letter 24* is not applicable to SFAS-106 and is therefore not relevant.[36] Alternatively, MCI asserts that the OPEB amounts already included in the GNP-PI are still in controversy and must be determined before exogenous treatment may be granted.[37] The LECs argue that previously submitted Godwins and NERA studies demonstrate that there is no double counting in their exogenous claims.[38]

28. AT&T Corp. (AT&T), on September 16, 1994, filed a petition to reject or, alternatively, to suspend and investigate Bell Atlantic's Transmittal 690. AT&T argues that because the Commission mandated LECs to adopt SFAS-106 as of January 1, 1993, OPEB costs incurred prior to that date were incurred voluntarily by the LEC and are, thus, endogenous. Accordingly, AT&T asserts, SFAS-106 costs incurred prior to January 1, 1993 should not be afforded exogenous treatment.[39] The LECs contend that the FASB adopted SFAS-106 in December of 1990 and that the Commission's Order directing the LECs to adopt SFAS-106 required the LECs to convert to the new accounting treatment for OPEB costs "on or before" January 1, 1993.[40] Accordingly, the LECs contend that OPEB amounts incurred as a result of conversion to SFAS-106 any time after the adoption by FASB should be afforded exogenous treatment.[41]

3. Decision

29. The LEC claims for exogenous treatment for SFAS-106 costs presented in the transmittals under consideration in this Order involve complex cost calculations and represent the potential for significant rate increases. Most of the price cap LECs have rates in effect that are under investigation in CC Docket No. 93-193 for their TBO amounts for retirees.

30. A comparison of the TBO filings that are under investigation with the instant filings shows that no two LECs have followed the same methodology for determining the OPEB amounts for which they seek exogenous treatment. Different LECs use different time periods for when costs were incurred and for which recovery is sought. The allowance of SFAS-106 costs incurred prior to January 1, 1993 is at issue. Some LECs have VEBA trusts; others do not. The proper treatment of VEBA trust amounts and their effect on exogenous claims related to SFAS-106 is not settled. Moreover, the LECS use different percentage adjustments to avoid the double counting of OPEB amounts that are already reflected in the price cap inflation factor. In addition, TBO amounts claimed by the LECs are also based on a broad array of actuarial assumptions.

31. Based on our analysis of Bell Atlantic Transmittal 690 and NYNEX Transmittal 328, we find that these transmittals raise significant questions of lawfulness that warrant suspension for one day, investigation, and imposition of an accounting order. We will designate specific issues, parties to the investigation and establish a pleading cycle for this investigation in a subsequent order.

B. Pacific and US West Transmittals

1. Description and Pleadings

32. Pacific's Transmittal 128 and US West's Transmittal 550 include no actual revisions to the existing terms, conditions or rates contained in their FCC tariffs. Instead, Pacific and US West merely include in their transmittals cost support showing the recalculation of their PCIs, based on their OPEB amounts.[42]

33. MCI filed petitions to suspend and investigate the Pacific and US West transmittals. MCI argues that the PCI adjustments proposed by Pacific and US West to reflect OPEB cost increases violate *RAO Letter 24*,[43] which according to MCI, requires LECs to recognize OPEB costs when they are actually funded.[44] The LECs reply that *RAO Letter 24* is not applicable to SFAS-106 and therefore is not relevant.[45] MCI also objects to US West's allocation of interest associated with OPEBs and OPEB amounts to nonregulated activities.[46] Lastly, MCI contends that since the Commission has not determined the OPEB costs that are already reflected in the GNP-PI adjustments that the LECs made in prior annual access tariff filings, the PCI adjustments of US West and Pacific may "double count" some OPEB costs.[47] Pacific contends that the NERA study

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[32] NYNEX does not give further explanation of those amounts which it characterizes as "make-whole."

[33] MCI's petition also requested suspension of Pacific Bell's Transmittal No. 1738, which is discussed in the next section.

[34] Accounting for Work Force Reduction Programs, *RAO Letter 24*, 9 FCC Rcd 1676 (Acct. and Aud. Div. 1994). This letter directs carriers to reflect work force reduction reported on their 1993 SEC Form 10-K filings for Part 32 purposes.

[35] MCI Petition at 6-7.

[36] Bell Atlantic Reply at 4; NYNEX Reply at 5; Pacific Reply at 3-6.

[37] MCI Petition at 7-8.

[38] Bell Atlantic Reply at 4-5; *see also* NYNEX Reply at 6-8; Pacific Reply at 6-8.

[39] AT&T Petition at 3-4.

[40] Bell Atlantic Reply at 2; *accord* NYNEX Reply at 3-4.

[41] *Id.*

[42] US West's PCI adjustment does not include TBO amounts for retirees because it included those amounts in its 1993 annual access tariffs. Pacific, however, did not include OPEB costs in its 1993 annual access filing. Therefore, Pacific's PCI adjustment includes all OPEB costs.

[43] Accounting for Work Force Reduction Programs, 9 FCC Rcd 1676 (Acct. & Aud. Div. 1994) (*RAO Letter 24*).

[44] MCI Petition against US West at 6.

[45] Pacific Reply at 3-4; US West Reply at 3-4.

[46] MCI Petition against US West at 7.

[47] *Id.* at 8.

discussed above refutes MCI's contention.[48] US West claims that MCI's assertions are insufficient to justify suspension of Transmittal 550.[49]

2. Decision

34. A tariff transmittal that does not contain revisions to a carrier's tariff is not cognizable under our rules or under the Communications Act of 1934, as amended. The Commission's rules require carriers to "maintain" current PCI information, but the information is only subject to notice requirements[50] once rates are changed pursuant to the PCI adjustment.[51] Because neither Pacific nor US West has filed tariff changes with their transmittals, the matter is not properly framed for the Bureau to act upon. We therefore dismiss the transmittals of Pacific and US West as procedurally deficient. Because we are dismissing the transmittals of US West and Pacific, we also dismiss the petitions of MCI against US West and Pacific as moot.

35. We note, however, that if US West or Pacific makes tariff revisions in the future based upon their recalculated PCIs, they must submit those PCI calculations as part of the supporting documentation. Further, when a subsequent Order is released designating issues and parties to the investigation established herein, US West and Pacific will be named as a parties to the investigation.

V. ORDERING CLAUSES

36. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, the tariff revisions filed under Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690 and NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328, ARE SUSPENDED for one day from the currently scheduled effective date.

37. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 204(a), 205(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), 205(a) and 403, an investigation IS INSTITUTED into the lawfulness of the tariff revisions filed under Bell Atlantic Telephone Companies Transmittal No. 690 and NYNEX Telephone Companies Transmittal No. 328.

38. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i) and 204(a), and Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Bell Atlantic Telephone Companies and NYNEX Telephone Companies SHALL KEEP ACCURATE ACCOUNT of all earnings, costs, and returns associated with the transmittals that are the subject of this investigation, and of all amounts paid thereunder and by whom such amounts are paid.

39. IT IS FURTHER ORDERED that Bell Atlantic Telephone Companies and NYNEX Telephone Companies SHALL FILE tariff revisions reflecting this suspension no later than three business days from the release date of this Order. It should cite the "DA" number of the instant Order as the authority for this filing.

40. IT IS FURTHER ORDERED that Pacific Bell Transmittal No. 1837 and US West Communications Transmittal No. 550 ARE DISMISSED as procedurally deficient.

41. IT IS FURTHER ORDERED that the petition to suspend and investigate US West Communications, Inc. Transmittal No. 550, filed by MCI Telecommunications Corporation IS DISMISSED as moot.

42. IT IS FURTHER ORDERED that the petition to suspend and to investigate Bell Atlantic Telephone Companies Transmittal No. 690, NYNEX Telephone Companies Transmittal No. 328 and Pacific Bell Transmittal No. 1738, filed by MCI Telecommunications Corporation IS GRANTED IN PART, IS DENIED IN PART and otherwise IS DISMISSED as moot.

43. IT IS FURTHER ORDERED that the petition to reject or, in the alternative, to suspend and to investigate Bell Atlantic Telephone Companies Transmittal No. 690, filed by AT&T Corp. IS GRANTED IN PART and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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[48] Pacific Reply at 3.
[49] US West Reply at 2-3.
[50] *See* Section 61.58 of the Commission's rules, 47 C.F.R. § 61.58, specifying notice requirements for tariff filings.
[51] *See* Section 61.45(a) of the Commission's rules, 47 C.F.R. § 61.45(a). That section provides rules requiring that LECs "subject to price cap regulation shall file adjustments to the PCI for each basket as part of the annual price cap tariff filing, and shall maintain updated PCIs to reflect the effect of mid-year exogenous cost changes." *See also* Section 61.49(a) of the Commission's rules, 47 C.F.R. § 61.49(a) ("each price cap tariff filing must be accompanied by supporting materials sufficient to calculate required adjustments to each PCI.").

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-123

In the Matter of

National Exchange Carrier Association — Transmittal No. 642

Revisions to Tariff F.C.C. No. 5

Universal Service Fund and
Lifeline Assistance Rates

MEMORANDUM OPINION AND ORDER SUSPENDING RATES AND DESIGNATING ISSUES FOR INVESTIGATION

Adopted: December 29, 1994; Released December 29, 1994

By the Deputy Chief, Tariff Division, Common Carrier Bureau:

1. On November 17, 1994, the National Exchange Carrier Association (NECA) filed Transmittal No. 642 to increase its Universal Service Fund (USF) monthly charge from 42.95 cents to 43.35 cents per line, and to decrease its Lifeline Assistance (LA) monthly charge from 9.01 cents to 8.48 cents per line.[1] The proposed rates would result in a net 0.13 cent per line per month decrease in rates. No parties filed petitions against NECA's Transmittal 642, which is scheduled to become effective on January 1, 1995.

2. In this filing, NECA, *inter alia*, is adjusting the projected USF and LA revenue requirement to account for differences between its prior projections and actual assistance provided. This procedure is known as "resizing."[2] NECA contends that, based on data for the April 1, 1989 through December 31, 1994 period,[3] the total USF revenue requirement was $3,111.9 million.[4] According to NECA, IXCs received billings of $3,122.2 million over this same period, resulting in a net surplus of approximately $10.3 million.[5] A net surplus of approximately $3.1 million was realized for LA.[6]

3. On February 5, 1993, the Common Carrier Bureau (Bureau) initiated an investigation into the lawfulness of the USF and LA rates filed by NECA in Transmittal Nos. 518, 527 and 530.[7] The Bureau designated issues in this investigation on April 23, 1993.[8] Among the issues designated for investigation was whether the USF rate established in the referenced transmittals is excessive due to "resizing" procedures employed by NECA.[9] In the instant transmittal, NECA used the same resizing procedures under investigation in CC Docket No. 93-123.

4. The Tariff Division has reviewed Transmittal 642. We conclude that sufficient questions exist regarding the lawfulness of the transmittal to warrant suspension for one day and investigation of the reasonableness of NECA's proposed rates. We also find that issues presented in Transmittal 642 are sufficiently similar to those in our current investigation of NECA's rate changes in CC Docket No. 93-123 that administrative convenience permits adding this transmittal to that investigation. We therefore suspend NECA's Transmittal 642 for one day and incorporate that transmittal into the investigation in CC Docket No. 93-123. The accounting order imposed in CC Docket No. 93-123 also applies to this transmittal.

5. Accordingly, IT IS ORDERED that the National Exchange Carrier Association, Inc. SHALL FILE tariff revisions on December 30, 1994, in order to advance the effective date of the tariff revisions filed under Transmittal No. 642 to December 31, 1994.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions filed by the National Exchange Carrier Association, Inc. in Tariff F.C.C. No. 5, Transmittal No. 642, ARE SUSPENDED for one day from December 31, 1994 and an investigation into the lawfulness of those tariff revisions IS INSTITUTED.

7. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions filed by the National Exchange Carrier Association, Inc. in Tariff F.C.C. No. 5, Transmittal No. 642, are subject to the investigation in CC Docket No. 93-123. The National Exchange Carrier Association, Inc. SHALL FILE a supplement reflecting this suspension on December 30, 1994. It should cite Special Permission No. 94-1505 as the authority for this filing.

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[1] NECA collects these charges from the largest interexchange carriers (IXCs) on the basis of the total number of lines presubscribed to each IXC. USF monies are distributed by NECA to promote affordable telephone service. NECA also provides LA monies to LECs for distribution to the LEC's low income subscribers.

[2] Section 36.631(e) of the Commission's rules, 47 C.F.R. § 36.631(e), defines the resizing procedure for the USF. Sections 36.741(b), 47 C.F.R. § 36.741(b), defines the resizing procedure for LA.

[3] Both USF and LA data reflect actual reported results for April 1, 1989 through September 30, 1994 and projections for October 1, 1994 through December 3, 1994. USF and LA resizing amounts include NECA administrative expenses, interstate expense incurred from borrowing and interest income earned on excess funds.

[4] NECA Description and Justification (D&J), Tr. No. 642 at 7.

[5] *Id.*

[6] *Id.* at Exhibit II.

[7] National Exchange Carrier Association, Revisions to Tariff F.C.C. No. 5, Universal Service Fund and Lifeline Assistance Rates, 8 F.C.C. Rcd 922 (Com. Car. Bur. 1993).

[8] National Exchange Carrier Association, Revisions to Tariff F.C.C. No. 5, Universal Service Fund and Lifeline Assistance Rates, 8 F.C.C. Rcd 2930 (Com. Car. Bur. 1993) (*Designation Order*).

[9] *Id.*

8. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i) and 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the National Exchange Carrier Association, Inc. SHALL KEEP ACCURATE ACCOUNT of all amounts received that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Deputy Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Golden West Broadcasters — File Nos. BR-900727YI, BRH-900727ZD

For Renewal of License of
Stations KMPC(AM)/KLIT(FM)[1]
Los Angeles/Glendale, California

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: December 30, 1994; Released: February 13, 1995

By the Commission: Commissioner Quello concurring in the result.

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications for the two captioned radio stations; (ii) a Petition to Deny timely filed on November 1, 1990, by the National Hispanic Media Coalition and Jose Luis Sedano, a member of the NHMC (collectively "NHMC") against the captioned renewal applications; (iii) a Petition to Deny timely filed on November 1, 1990, by the California State Conference of Branches of the National Association For the Advancement of Colored People and various local NAACP branches (collectively "NAACP") and the National Black Media Coalition, the Bay Area Black Media Coalition and the Los Angeles Black Media Coalition (collectively "NBMC")[2] against the captioned renewal applications; (iv) the licensee's opposition to the petitions; (v) the licensee's response to a staff inquiry; and (vi) various other pleadings.

II. BACKGROUND

2. The NAACP/NBMC and the NHMC allege that the challenged stations violated our EEO Rule and policies. Accordingly, they request that we conduct an investigation of the employment practices of the stations pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*) and designate the renewal applications for hearing.

III. PLEADINGS

3. *STANDING.* The licensee of KMPC(AM)/KLIT(FM) challenges the standing of the NHMC and the NAACP/NBMC to petition to deny its renewal applications. The licensee argues that the statement submitted with NHMC's petition contains only generalized allegations and that the declarant, Jose Luis Sedano, does not claim to be a listener of the stations. Therefore, KMPC(AM)/KLIT(FM) argue that the NHMC should be considered an informal objector. The licensee also argues that the NAACP/NBMC should be considered informal objectors because their statements did not assert listenership or service area residency. Finally, it argues that the Los Angeles Black Media Coalition's (LABMC) claim of standing is also defective because the declaration submitted by its Chairperson is unsigned and, even if signed, would fail to establish standing because the declarant fails to state that she is a regular listener of the stations.

4. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show ... that a grant of the applications would be *prima facie* inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. §309(d)(1). *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. § 309(d)(1).

5. Filed with the petition to deny were unsigned declarations under penalty of perjury from the Chairman of the NBMC and the Chairperson of the LABMC, the latter of whom states that she is a regular listener of KMPC(AM)/KLIT(FM). Subsequent to the licensee's opposition, the NBMC submitted a late-filed, signed declaration from the Chairperson of the LABMC. The petitioner's filing is untimely and it has not provided sufficient justification for its late filing. As we stated in *Application of Certain Broadcast Radio Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988), we will not acquiesce to the submission of late filings for nonsubstantial reasons. Accordingly, pursuant to Section 73.3587 of the Commission's Rules, 47 C.F.R. §73.3587, the NBMC will be considered an informal objector in its challenge against KMPC(AM)/KLIT(FM).

6. The petition contained a statement under penalty of perjury from the President of the California State Conference of the NAACP. However, the President does not state that he is either a listener of the challenged stations or a resident of the service area. The Commission has held previously that without such assertions, the declaration does not satisfy the standing requirements of the Act. *See Applications of Certain Broadcast Stations Serving Communities in the States of Michigan and Ohio*, 3 FCC Rcd 6944 (1988); *see also Applications of KDEN Broadcasting Co.*, 55 Rad. Reg. 2d (P&F) 1311, 1311-1312 (1984). Accordingly,

[1] Station KLIT(FM) changed its call letters to KSCA(FM) on September 1, 1994. For consistency, we refer to the station as KLIT(FM) in this document. In addition, we note that the present licensee of the stations owned KMPC(AM) for the entire license term and took control of KLIT(FM) on December 5, 1985.

[2] The Petition also includes challenges against other radio stations in California, some of which have already been addressed in separate Commission orders and the remainder of which will be addressed in future Commission orders.

we hold that the NAACP lacks standing to petition to deny Stations KMPC(AM)/KLIT(FM) and we will treat its pleading as an informal objection.

7. Timely filed with NHMC's petition to deny was a declaration under penalty of perjury from Jose Luis Sedano, a member of the NHMC and a resident of the stations' service area. Contrary to the licensee's arguments, we find that this declaration complies with the requirement for establishing standing for the NHMC. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987). We find, therefore, that the challenge filed by the NHMC constitutes a valid petition to deny against KMPC(AM)/KLIT(FM).

8. *Prima Facie Case*. The NAACP/NBMC and the NHMC derived their factual allegations from the licensee's EEO program and annual employment reports. Review of the licensee's EEO record led us initially to conclude that the NAACP/NBMC and the NHMC presented a *prima facie* case demonstrating that unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act, 47 U.S.C. § 309(d)(1). *Astroline, supra*. Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual, supra*.

9. However, subsequent review of the NAACP/NBMC and the NHMC's EEO allegations, as well as the licensee's renewal applications, opposition and inquiry response, leads us to conclude that there are no substantial and material questions of fact warranting designation for a hearing. In addition, we find no evidence that the licensee engaged in discrimination. Thus, grant of the applications will serve the public interest. 47 U.S.C. § 309(d)(2). *Astroline, supra*. Accordingly, we will grant renewal, but with appropriate remedies and sanctions.

IV. DISCUSSION

10. Section 73.2080 of the Commission's Rules, 47 C.F.R. § 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. See Sections 73.2080(b) and (c) of the Commission's Rules, 47 C.F.R. §§ 73.2080(b) and (c).

11. When the renewal application indicates an absence of evidence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of remedies and sanctions, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the renewal application for hearing where the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987); *see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra*.

12. Review of the licensee's renewal applications, oppositions and inquiry responses reveals that the stations had 62 full-time hiring opportunities, including 47 for upper-level positions, from January 1, 1987, through October 15, 1990.[3] According to its renewal applications, the licensee indicates that it contacted the following general sources and received the cited minority referrals: the *Los Angeles Times* (1), six other general publications (0), 19 local colleges and universities (0), and 18 general organizations. The licensee reports contacting but receiving no minority referrals from the following minority and women's sources: the *Japanese Daily News of Los Angeles*, five other minority publications, the California Chicano News Media Association Job Bank, American Indian Employment and Training, the Los Angeles Black Media Coalition, six other minority organizations, the Hispanic Women's Council, Women in Film and Women at Work. The licensee also reports that it received five minority referrals from employees and that three additional minority referrals were walk-ins. The licensee did not affirmatively recruit for 26 (42%) of its 62 vacancies.[4] Of the remaining 36 recruited jobs, for ten vacancies, it contacted one of the following general sources: the Seattle Mariners, an employment agency, *Radio and Records Magazine*, *L.A. Times*, on-air ads, another California radio station and the Southern California Broadcasters Association (SCBA). For six vacancies, it contacted the SCBA and *Adweek*. For 18 positions, the licensee contacted at least 34 general, 11 minority,[5] one minority women's (the Hispanic Women's Council) and two women's sources. For its last two vacancies, occurring October 15, 1990 -- a month and a half before the stations' licenses expired -- the licensee contacted 45 general, 16 minority, one minority women's, two women's sources and the SCBA Employee Bulletin, a biweekly publication distributed to almost 200 sources, including minority and women's sources.

13. Of the 62 full-time positions, including 47 upper-level positions, the licensee did not know the number, race or gender of applicants for two upper-level positions. For the 60 overall positions with complete applicant data, the licensee had 169 applicants, 56 of whom were

[3] The license term ended on December 1, 1990.

[4] We note that the licensee hired minorities for five of these positions. Those hires notwithstanding, the licensee is reminded that under our EEO Rule, 47 C.F.R. § 73.2080, it has an affirmative obligation to recruit for females and minorities for each vacancy. Inasmuch as KMPC(AM)/KLIT(FM) neglected to recruit for 26 jobs, female, as well as minority, employment was affected.

[5] These sources included the Black Media Coalition, El Centro Del Amnestia, the Asian American Journalist Association, the California Chicano News Media Association Job Bank, United Cambodian Community, Inc., Chicano Management Students Association, Los Angeles Urban League, National Association of Black Accountants, American Indian Employment and Training, the NAACP and Orange County Indian Center.

minorities (25 Blacks, 21 Hispanics, seven Asian/Pacific Islanders and three American Indians).[6] For the 45 upper-level positions with complete applicant data, the licensee had 119 applicants, 18 of whom were minorities (nine Blacks, six Hispanics and three American Indians). Minorities were in the applicant pools for 26 overall and 14 upper-level positions. For the 62 overall positions, the licensee hired 18 minorities (nine Blacks, four Hispanics, three Asian/Pacific Islanders and two American Indians), including seven minorities (four Blacks, one Hispanic and two American Indians) for the 47 upper-level positions.[7]

14. The NHMC contends that the licensee failed to implement a legally adequate program to employ Hispanics and other minorities and failed to meaningfully self-assess its inadequate EEO program. The NHMC asserts that the stations' 1990 Annual Employment Report reflects serious underemployment of minorities, especially Hispanics.[8] It also argues that the licensee's renewal applications reflect manifest inadequacies in the licensee's EEO program because the applications list only nine (including eight in-house) minority referrals from all of its recruitment sources. The NHMC concludes that the licensee apparently obtained no minority referrals for many of its hiring opportunities. The NHMC contends that the stations had one of the poorest hiring records in 1990 of any major Los Angeles radio station, with only two minorities hired out of 13 positions during the renewal year, *i.e.*, the 12-month period prior to filing the stations' renewal applications. The NHMC argues that the licensee has not addressed its failure to employ minorities adequately, especially Hispanics in upper-level positions.

15. The NAACP/NBMC argue that the stations' 1990 EEO program is inadequate on its face. They argue that there is no excuse for the stations' marginal EEO performance—hiring only two minorities and receiving only one minority referral from sources during the renewal year (July 1, 1989 to June 30, 1990)—given the large number of hiring opportunities (13) and the abundance of minorities in Los Angeles. The NAACP/NBMC contend that the total absence of minority referrals from the 65 sources listed in its renewal applications "could not have happened if the licensee had made even the most ephemeral attempts to encourage these organizations to refer candidates."[9] The NAACP/NBMC argue that the Commission should determine whether the stations' questionable EEO program combined with its failure to employ more than a token number of minorities is indicative of a deliberate violation of the EEO Rule or discrimination.

16. In response, the licensee states that it has engaged in good faith efforts to hire and promote minority employees and that the stations' employment profile during the past several years reflects these good faith efforts.[10] The licensee contends that, although employment is only one aspect of the Commission's analysis, it should not be ignored because it is what the Commission's prescribed EEO recruiting procedures, such as recordkeeping and self-assessment, are designed to achieve.[11] The licensee argues that minorities have been successfully recruited and hired at the stations even though the minority-specific sources contact-

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[6] The licensee states that it considers only individuals who are interviewed to be applicants.

[7] The Los Angeles - Long Beach, California Metropolitan Statistical Area (MSA) is 41.9% minority (10.8% Black, 24.4% Hispanic, 6.1% Asian/Pacific Islander and .6% American Indian). KMPC(AM)'s 1984 Annual Employment Report lists 15 minorities (seven Blacks, six Hispanics, one Asian/Pacific Islander and one American Indian) on an overall staff of 62 (24.2%) and eight minorities (three Blacks, four Hispanics and one American Indian on an upper-level staff of 46 (17.4%). In 1985, KMPC(AM) employed 14 minorities (six Blacks, six Hispanics, one Asian/Pacific Islander and one American Indian) on an overall staff of 62 (22.6%) and eight minorities (two Blacks, five Hispanics, and one American Indian) on an upper-level staff of 48 (16.7%). The licensee of KMPC(AM) took control of KLIT(FM) on December 5, 1985. The stations' 1986 and 1988 Annual Employment Reports list 18 minorities (ten Blacks, seven Hispanics and one Asian/Pacific Islander) on an overall staff of 70 (25.7%) and 11 minorities (five Blacks and six Hispanics) and ten minorities (four Blacks and six Hispanics) on upper-level staffs of 53 (20.8%) and 52 (18.5%). In 1987, the stations employed 20 minorities (11 Blacks, eight Hispanics and one American Indian) on an overall staff of 77 (26.0%) and 11 minorities (four Blacks, six Hispanics and one American Indian) on an upper-level staff of 59 (18.6%). In 1989, the stations employed 22 minorities (eight Blacks, 11 Hispanics, two Asian/Pacific Islanders and one American Indian) on an overall staff of 75 (29.3%) and ten minorities (three Blacks, six Hispanics and one American Indian) on an upper-level staff of 54 (18.5%). In 1990, the stations employed 21 minorities (ten Blacks, nine Hispanics and two Asian/Pacific Islanders) on an overall staff of 74(28.4%) and nine minorities (four Blacks and five Hispanics) on an upper-level staff of 53 (17.0%).

[8] The NHMC requests that the Commission use 1990 U.S. Census Data as soon as it becomes available when analyzing these stations' EEO records. However, as the Commission announced previously, it began applying the 1990 labor force statistics only to license renewal applications that were due to be filed after May 31, 1993. EEO Branch of MMB To Use 1990 U.S. Census Data, Public Notice # 32651 (April 12, 1993).

[9] The NAACP/NBMC compare the stations' program to that of KBIG(FM), Los Angeles, California. Its EEO program listed many of the same sources as KMPC(AM)/KLIT(FM), yet that licensee reported 33 minority referrals.

[10] The licensee details the figures reflected in its 1984 through 1990 Annual Employment Reports and contends that, every year, it was just short of, substantially met, met, or exceeded the Commissions' processing guidelines regarding minorities in overall and upper-level full-time positions.

[11] The licensee argues that the percentage of Hispanics in the Los Angeles MSA must be discounted significantly to reflect only the percentage of Hispanics in the workforce who are able to speak English better than "not well or not at all," as reflected in the *1980 Census Tracts: Los Angeles-Long Beach, CA Standard MSA*, Table P-20. The limiting factor of language and its effect upon minority employment are similar to those articulated in *Wards Cove Packing Co. v. Antonio*, 109 S. Ct. 2115 (1989) (*Wards Cove*). Therein, the court ruled that "such factors (*i.e.*, comparison between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs) must be considered in statistical evaluation of station employment." The Commission has reviewed the applicability of Title VII to our EEO responsibilities before and found that our oversight in this area goes beyond the factors in Title VII that may serve as limits on anti-discrimination efforts. *See South Carolina Renewals*, 5 FCC Rcd 1704, 1709 n.4 (1990); *WXBM-FM*, 6 FCC Rcd 4782, 4786 n.13 (1991); *Ogden Broadcasting*, 7 FCC Rcd 1895 (1992). Therefore, because our EEO obligations flow, not from Title VII, but from the Communications Act of 1934, as amended, 47 U.S.C. § 307(a) and (b), we find that *Wards Cove* does not limit our analysis of a licensee's efforts to attract minority applicants.

ed by the stations have not proven very productive.[12] KMPC(AM)/KLIT(FM) states that it has contacted these sources as well as other organizations, entities and referral sources likely to refer minority and female applicants and has annually updated its list of sources. In an effort to improve the number of minority referrals received, the stations argue that they began placing ads in the SCBA Employment Bulletin, which is sent to almost 200 sources of potential minority applicants.[13]

17. Our review of the record discloses no substantial and material questions of fact to warrant designation for hearing. *Astroline, supra.* We also find no evidence of discrimination. During the period under review, the licensee contacted recruitment sources, including minority organizations; received minority referrals; and interviewed and hired minorities for overall and upper-level positions. Therefore, renewal of the license is in the public interest.

18. However, we find KMPC(AM)/KLIT(FM)'s overall recruitment efforts deficient because the licensee failed to contact minority specific sources for almost half of its vacancies and minorities were absent from a significant number of the licensee's applicant pools. 47 C.F.R. §73.2080. These facts are particularly egregious because the Commission's staff had previously alerted the licensee in a 1984 renewal letter to the absence of Asian/Pacific Islanders and to the small number of Hispanics on its full-time staff.[14] Further, at that time, the Commission's staff stated that it expected the licensee to make reasonable, good faith efforts to recruit Asian/Pacific Islander and Hispanic applicants during the coming license term. However, even though the record indicates no Asian/Pacific Islander applicants or hirees for upper-level positions, few Hispanic applicants, and only one Hispanic upper-level hire, the licensee's submission for the current license term did not indicate assessment of its program to better attract applicants from these groups or reasonable modification of its EEO program.

19. We believe that the record in the instant case is similar to, but more egregious than, that of the licensee of KSBW-TV, Salinas, California, in *Application of KSBW License, Inc. For Renewal of License for Station KSBW-TV, Salinas, California,* 9 FCC Rcd 6701 (1994) (*KSBW-TV*).[15] The licensee therein affirmatively recruited for 71 of its 72 full-time positions but used minority sources for only 47 of its 72 full-time positions and failed to recruit minorities for a significant number of its vacancies. In addition, the licensee could not document applicant or interview pool data for each position. KSBW-TV hired fifteen minorities, including nine Hispanics (the dominant minority group), three American Indians, two Asians and one Black, all for upper-level positions. In that case, we concluded that the licensee failed to engage in adequate recruitment efforts and conduct meaningful self-assessment of its EEO program. The licensee received a $15,000 Notice of Apparent Liability and reporting conditions.

20. The record in this case indicates that the licensee recruited for only 36 of its 62 jobs and that minorities were present in only 26 applicant pools. In addition, KMPC(AM)/KLIT(FM) failed to contact minority sources for 42 (over two-thirds) of its vacancies. Further, even though no Asian/Pacific Islanders applied or were hired for upper-level positions and few Hispanics applied and only one was hired for an upper-level position, the licensee gave no indication that it assessed its program to attract more applicants from these groups or that it modified its EEO program accordingly. This occurred despite the fact that, at the time of the stations' last renewal, the staff sent the stations a letter highlighting its failure to employ these two minority groups in significant numbers. Overall, the licensee hired 18 minorities, including nine Blacks, four Hispanics, three Asian/Pacific Islanders and two American Indians. Of these, four of the Black, the two American Indians and one Hispanic were hired for upper-level positions. The Los Angeles-Long Beach MSA is 41.9% minority, including 24.4% Hispanic and 6.1% Asian/Pacific Islander.

21. Similarities exist between the above-cited stations' EEO records. Both licensees failed to contact minority specific sources for a significant number of their vacancies. In addition, both licensees failed to recruit minorities for a significant number of vacancies in areas with high percentages of minorities in the labor force. However, the licensee of KSBW-TV affirmatively recruited for almost all vacancies and, out of 63 upper-level hiring opportunities, hired nine Hispanics, the dominant minority group at 32% of the labor force. In contrast, the licensee of KMPC(AM)/KLIT(FM) failed to recruit affirmatively for almost half of its vacancies and hired only one Hispanic, the dominant minority at 24.4% of the labor force, for an upper-level position despite 47 upper-level hiring opportunities. The stations' location in an extremely significant MSA of 41.9% minorities, as well as the afore-mentioned letter from the staff, should have prompted KMPC(AM)/KLIT(FM) to increase their outreach efforts to include use of minority-specific sources when vacancies occurred. Further, the stations experienced a large hiring cycle during the last three years of the license term, which could have translated into increased numbers of minority applicants. Given the facts of this case and broadcasters' familiarity with our long-standing EEO rule, we feel that the circumstances in this case justify issuance of a Notice of Apparent Liability for $20,000. Accordingly, we will grant renewal subject to reporting conditions as set forth below and issue a Notice of Apparent Liability for $20,000.

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[12] The licensee contends that it should not be blamed because the minority sources contacted were not as productive as it had hoped. It also points out that the Commission has not traditionally penalized stations for contacting just general sources if they are productive. In *South Carolina Renewals,* 5 FCC Rcd 1704, 1709 n.8 (1990), the Commission stated that if a licensee obtained a meaningful pool of referrals from exclusive reliance on general sources, it would not be faulted for failing to contact minority specific sources. However, we note that the licensee in this case failed to recruit minorities or contact any sources, general or minority, for a significant number of vacancies.

[13] We note that the licensee did not begin contacting the SCBA Bulletin until a month and a half before the license term ended and then for only two of its 62 vacancies. In addition, we note that, although requested by Commission staff, the licensee was unable to provide a copy of the Bulletin advertising a position at the stations during the period under review.

[14] Letter from Glenn Wolfe, Chief, EEO Branch, to Michael Schreter, Executive Vice-President, Golden West Broadcasters (January 24, 1984).

[15] The Salinas-Seaside-Monterey California MSA is 44.9% minority.

V. CONCLUSION

22. After reviewing the record before us, we find that no hearing is warranted and the renewal applications of KMPC(AM)/KLIT(FM) should be granted. However, the renewal applications of KMPC(AM)/KLIT(FM) will be granted subject to reporting conditions and a Notice of Apparent Liability of forfeiture for $20,000.

VI. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that the Petition to Deny filed by the NHMC and its member, Jose Luis Seldano, against the renewal applications for Stations KMPC(AM)/KLIT(FM) IS DENIED.

24. IT IS FURTHER ORDERED that the Informal Objection filed by the NBMC and the NAACP against Stations KMPC(AM)/KLIT(FM) IS DENIED.

25. IT IS FURTHER ORDERED that the license renewal applications filed by Golden West Broadcasters for Stations KMPC(AM)/KLIT(FM) ARE GRANTED subject to reporting conditions as described herein and, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. § 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $20,000.[16]

26. IT IS FURTHER ORDERED that the licensee of KMPC(AM)/KLIT(FM) submit to the Commission an original and one copy of the following information on August 1, 1995, August 1, 1996, and August 1, 1997:

(a) For each report, please make two lists divided by full-time and part-time vacancies during the 12 months preceding the respective reporting dates, indicating the job title and FCC job category of the position, the race or national origin, sex and the referral source of each applicant for each and the race or national origin and sex of the person hired. The lists should also note which recruitment sources were contacted;[17]

(b) A list of employees as of the July 1, 1995, payroll period for the first report and as of the July 1, 1996, and July 1, 1997, payroll periods, for the second report and third reports by job title and FCC job category, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin;

(c) Details concerning the stations' efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

27. IT IS FURTHER ORDERED that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this *Memorandum Opinion and Order and Notice of Apparent Liability*.

28. The reports are to be filed with the Acting Secretary of the Commission to the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch (202-632-7069). Regarding the forfeiture proceedings for KMPC(AM)/KLIT(FM), the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this *Memorandum Opinion and Order and Notice of Apparent Liability*. Any comments relating to the ability to pay should include those financial letters set forth in the attached note.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[16] In this regard, we are mindful of a pending application for assignment of the license of KMPC(AM) from Golden West Broadcasters to KABC-AM Radio, Inc. (File No. BAL-940503EA). In the event that the license is assigned or transferred to a new licensee, the reporting conditions will apply to the assignee of KMPC(AM) upon consummation of the sale or transfer. *See San Luis Obispo Limited Partnership*, 9 FCC Rcd 894 (1994); *Woolfson Broadcasting Corporation*, 4 FCC Rcd 6160 (1989). We note that reporting conditions will still apply to the licensee of KLIT(FM).

[17] Such a list might start:

(1) News Director; Officials and Managers:

Full-time

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: Black male (03/15/94)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLTEL Service Corporation AAD 94-115

on behalf of

ALLTEL Carolina, Inc., Heins Telephone Co.

and

Sandhill Telephone Company

Petition for Waiver of the
Definition of "Study Area"
Contained in Part 36,
Appendix-Glossary,
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1994; Released: December 22, 1994

By the Chief, Accounting and Audits Division

I. INTRODUCTION

1. On August 22, 1994, ALLTEL Service Corporation ("ALLTEL"), on behalf of its telephone affiliates ALLTEL Carolina, Inc. ("ALLTEL Carolina"), Heins Telephone Company ("Heins"), and Sandhill Telephone Company ("Sandhill") (collectively, "Petitioners") filed a petition for waiver ("Petition") of the definition of "Study Area" contained in Part 36, Appendix-Glossary, of the Commission's rules. The requested waiver would allow ALLTEL Carolina to change its study area boundaries to conform to its recently approved merger with Heins and Sandhill.[1]

2. On September 22, 1994, the Common Carrier Bureau ("Bureau") released a public notice soliciting comments on ALLTEL's Petition.[2] We received comments supporting the Petition from two parties: the National Exchange Carrier Association, Inc. ("NECA") and the United States Telephone Association ("USTA"). ALLTEL also submitted a copy of the North Carolina Commission's order approving the merger between ALLTEL Carolina, Heins, and Sandhill.[3] No party filed comments objecting to the Petition. In this order, we find that allowing ALLTEL Carolina, Heins, and Sandhill to consolidate their study areas will serve the public interest and we therefore grant the Petition, as explained more fully below.

II. BACKGROUND

3. ALLTEL Carolina is a local telephone company that provides telephone service in 26 exchanges with approximately 121,600 access lines. Heins provides telephone service in three exchanges with approximately 30,000 access lines and Sandhill provides telephone service in two exchanges with approximately 4,800 access lines. All three companies serve primarily suburban and rural areas of North Carolina. ALLTEL proposes to consolidate the Heins and Sandhill study areas into the ALLTEL Carolina study area consistent with its recent corporate merger.

4. A study area is a geographical segment of a carrier's telephone operations. Generally, a study area corresponds to a carrier's entire service territory within a state. Thus, carriers that operate in more than one state typically have one study area for each state, and carriers that operate in a single state typically have a single study area. Carriers perform jurisdictional separations at the study area level.[4] The Commission froze all local exchange carrier ("LEC") study area boundaries as they existed on November 15, 1984, to ensure that LECs do not set up high cost exchanges within their existing service territories as separate study areas to maximize high cost support.[5]

5. Carriers wishing to change their study area boundaries can file a petition for waiver of the applicable rule.[6] The Commission has three primary concerns in evaluating petitions seeking such a waiver: first, that the change does not adversely affect the Universal Service Fund ("USF") support program;[7] second, that the state commission(s) having

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[1] On Sept. 14, 1993, the North Carolina Utilities Commission ("North Carolina Commission") approved the merger among ALLTEL Carolina, Heins, and Sandhill effective on or after Jan. 1, 1995. Under the North Carolina Commission's Order, ALLTEL Carolina is the surviving corporation after the companies merge. *See* North Carolina Utilities Commission Order, Docket No. P-118, SUB 75; Docket No. P-53, SUB 64; Docket No. P-26, SUB 111 (Sept. 14, 1994) ("North Carolina Commission Order").

[2] Public Notice, 9 FCC Rcd 5256 (Com. Car. Bur. 1994).

[3] Letter from Diane Smith, ALLTEL, to Adrian Wright, FCC, dated September 16, 1994.

[4] The phrase "jurisdictional separations," or "separations," refers to the process of dividing costs, revenues, and expenses between a carrier's state and interstate operations. *See generally* 47 C.F.R. §§ 36.1-36.741.

[5] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (*1984 Joint Board Recommendation*), adopted by Commission, 50 Fed. Reg. 939 (Jan. 8, 1985) (*1985 Order Adopting Recommendations*). *See also* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*Study Area Notice*).

[6] 47 C.F.R. Part 36, Appendix-Glossary. *See also*, 47 C.F.R. § 1.3.

[7] *Joint Board Recommendation*, 49 Fed. Reg. at 48337, para. 65. The Commission created the USF to preserve and promote universal telephone service. *See* Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 96 FCC 2d 781 (1984). The USF allows local exchange carriers with high local loop costs to allocate a portion of those costs to the interstate jurisdiction, thus allowing the states to establish lower local exchange rates in those service areas. To qualify for USF support, a LEC's total company unseparated loop costs must exceed 115 percent of the nationwide average for such costs. *See* 47 C.F.R. § 36.631.

regulatory authority does not object to the change:[8] and third, that the public interest supports the change. Any party requesting a waiver of a rule must show good cause why that waiver should be granted, and must persuade the Commission that the requested relief will not undermine the interests served by the rule.[9]

III. PETITION

6. Petitioners seek a waiver to consolidate the Heins and Sandhill study areas into the ALLTEL Carolina study area effective on or after January 1, 1995. Petitioners argue that the merger of these three study areas will promote the public interest in several ways: by eliminating the duplicative preparation and filing of various documents, tax returns and tariffs; by reducing the Petitioners' combined annual USF draw by $6,906; and by reducing the Petitioners' combined annual interstate access revenue requirements by $368,378.[10] Petitioners state that this reduction in interstate revenue requirements is primarily due to a decrease in the DEM weighting factor,[11] which would occur as a result of the study area consolidation. Petitioners further state that the reduction in interstate revenue requirements would result in lower interstate access traffic sensitive rates for their current subscribers.[12]

IV. DISCUSSION

7. *USF impact.* Petitioners state that, for existing study areas, the 1994 level of USF support is $4,529,336 for ALLTEL Carolina, $15,649 for Sandhill and $0 for Heins. These amounts together total $4,544,985. Petitioners further state that, for the proposed study area reconfiguration, this total amount of USF support would decline by $6,906 to a level of $4,538,079.[13] We have reviewed the Petitioners' estimates and conclude that the proposed reconfiguration would not adversely affect the USF support program.

8. *State commission approval.* The North Carolina Commission approved the proposed merger and reorganization, effective on, or after, January 1, 1995. The North Carolina Commission explained that this proposed change would enable the Petitioners to eliminate duplicate operating functions (such as purchasing, engineering, finance and accounting) that are presently performed separately for each of the three companies. The North Carolina Commission concluded that the resultant cost reductions will ultimately be reflected in the rates charged to the Petitioners' customers.[14]

9. *Public interest finding.* We are persuaded by the Petitioners that the proposed study area reconfiguration would lower interstate access traffic sensitive rates for their current subscribers. Petitioners show these rates would be reduced because the reconfiguration would lower the Petitioners' combined interstate revenue requirements by approximately $368,378 annually.[15] In addition, we agree with the North Carolina Commission that the proposed reconfiguration would enable the Petitioners to eliminate duplicate operating functions and that the resultant cost reductions would ultimately be reflected in the rates charged to the Petitioners' customers.

10. We find, based on the record as a whole, that the Petitioners have shown good cause for our granting the requested waiver. Accordingly, we grant the Petitioners' request that ALLTEL Carolina be permitted to reconfigure its study area boundaries to conform to its merger with the Heins and Sandhill study areas.

V. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c), and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the Petition of ALLTEL Service Corporation, on behalf of its affiliates ALLTEL Carolina, Inc., Heins Telephone Company, and Sandhill Telephone Company, for waiver of Part 36, Appendix-Glossary, of the Commission's rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

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[8] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974, 5976 (1990) (*"Study Area Notice"*). In that notice the Commission described the factors that led to the present restriction on study area changes and tentatively concluded that future modifications to study area boundaries may be approved if the state jurisdiction does not oppose the change.

[9] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). The three-part test for a study area waiver is part of the good cause showing required for all waivers.

[10] *Petition* at 3.

[11] DEM (*i.e.*, relative dial equipment minutes of use) weighing is an allocation methodology that serves as a federal subsidy to aid small carriers. Large carriers (*i.e.*, those with more than 50,000 access lines) allocate costs to the interstate jurisdiction based on their interstate DEM. Small carriers are allowed to multiply their interstate DEM by specified factors, thus allowing the recovery of greater percentages of their costs from the interstate jurisdiction. *See* 47 C.F.R. § 36.125.

[12] Petition at 3-4.

[13] Petition at Attachment B.

[14] North Carolina Commission Order at 1-2.

[15] *Id.* at 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VANTAGE CABLE ASSOCIATES, L.P.

Appeal of Local Rate Order
of the City of West Branch, IA

ORDER

Adopted: December 22, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Vantage Cable Associates, L.P. ("Vantage"), the franchisee in the captioned matter, filed on November 16, 1994, an Appeal ("Appeal") of the local rate order ("Local Rate Order") adopted October 17, 1994 by the City of West Branch, Iowa ("City").[1] The City did not submit any pleadings in opposition to Vantage's Appeal. The Local Rate Order establishes regulated rates for Vantage's basic cable service and associated equipment, as provided by the Cable Television Consumer Protection and Competition Act of 1992.[2]

2. In its Appeal, Vantage challenges those portions of the Local Rate Order which (1) order Vantage to refund to subscribers $1.41 per month, as well as any related franchise fees which were assessed during the period of time between September 1, 1993 and May 15, 1994, plus interest thereon; (2) restrict Vantage from taking external cost adjustments for increases in external costs prior to July 6, 1994, the initial date of regulation of Vantage's basic cable service, and prohibit Vantage from recovering external costs other than franchise obligations and public, educational and government ("PEG") costs; and (3) order Vantage to implement refunds immediately.[3]

II. STANDARD OF REVIEW

3. Under the Commission's rules, appeals of franchising authorities' local rate orders are reviewed by the Commission.[4] In ruling on an appeal of a local rate order, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[5] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering a local rate order.[6] If the Commission reverses a franchising authority's decision, it will not substitute its own decision, but instead it will remand the issue to the franchising authority with instructions for its resolution.[7] The two issues under consideration in the instant appeal are discussed in the ensuing section of the Order.

III. DISCUSSION

A. Refund Liability

4. In the Local Rate Order, the City ordered Vantage to refund all basic service tier and franchise fee overcharges, plus interest thereon, for the period of time between September 1, 1993 and July 14, 1994. It is Vantage's contention, however, that small systems were not subject to rate regulation prior to May 15, 1994 and, therefore, Vantage cannot be subject to refund lability for the period of time between September 1, 1993 and May 15, 1994. Vantage does not dispute its refund liability for the period of time between May 15, 1994 and July 14, 1994. Accordingly, Vantage intends to implement refunds to its subscribers for all overcharges during the period of time between May 15, 1994 and July 14, 1994.[8]

5. Prior to the commencement of cable rate regulation, the Commission stayed its rate regulation rules with respect to small cable systems.[9] Because Vantage currently serves approximately 570 subscribers in the City, and has never served 1,000 or more subscribers, it qualifies as a small system, as defined by the Commission's rules.[10] The Commission terminated the stay of rate regulation for small systems on May 15, 1994.[11] Under the Commission's rules, certified local franchising authorities were permitted to begin regulating small cable systems on May 15, 1994.[12] Because Vantage was a small system as of September 1, 1993, it is not subject to refund liability for any basic tier and/or

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[1] Vantage also filed a Request for Partial Stay of the Local Rate Order on November 16, 1994. As discussed in paragraph 10, *infra* , Vantage's Request for Partial Stay is dismissed as moot in light of the decision on the merits herein.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment and installations. See Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), *as amended*, 47 U.S.C. § 543(b) (1993).

[3] Vantage contends that it should not have to implement refunds until at least sixty (60) days subsequent to the issuance of the Local Rate Order. However, as more than sixty (60) days have passed since the adoption of the Local Rate Order, this portion of Vantage's Appeal is rendered moot. Therefore, this portion of Vantage's Appeal is dismissed. *See* Paragraph 9, *infra*.

[4] 47 C.F.R. §76.944.

[5] *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket 92-266, 8 FCC Rcd 5631, 5731 (Rel. May 3, 1993); *Third Order on Reconsideration* in MM Docket 92-266, 9 FCC Rcd 4316, 4346 (Rel. March 30, 1994).

[6] *Id.*

[7] *Id.*

[8] Appeal, at p. 3.

[9] *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking-Rate Regulation*, 8 FCC Rcd 5585, 5588 (Rel. August 10, 1993).

[10] *See* 47 C.F.R. §76.901(c).

[11] *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 4119, 4234 (Rel. March 30, 1994).

[12] 47 C.F.R. §76.934(b).

equipment overcharges prior to May 15, 1994.[13] The City thus acted unreasonably when it required Vantage to issue refunds for overcharges prior to May 15, 1994. Accordingly, this portion of Vantage's Appeal is remanded to the City for resolution in accordance with the terms of this Order.

B. External Costs

6. The City allowed Vantage, on a going forward basis, to make adjustments to its basic tier rate to include external cost increases due to franchise imposed obligations, including PEG costs, which occurred after July 6, 1994, Vantage's initial date of regulation.[14] However, Vantage contends that it is entitled to external cost adjustments for costs incurred beginning February 28, 1994. Vantage further contends that the City improperly restricted Vantage's ability to pass through any external costs other than franchise obligations and PEG costs.

7. Under the Commission's rules, a cable operator's starting date for external cost adjustments for a tier of regulated programming service shall be the earlier of (a) the initial date of regulation for any basic or cable service tier; or (b) February 28, 1994.[15] Vantage is entitled to make adjustments to its basic tier rate to include external cost increases beginning on February 28, 1994, since this date is earlier than its initial date of regulation, which is July 6, 1994. Furthermore, our rules define external costs as including the following: (a) state and local taxes; (b) franchise fees; (c) costs of complying with franchise requirements, including PEG costs; (d) retransmission consent fees and copyright fees incurred for the carriage of broadcast signals; and (e) other programming costs.[16] Vantage may make adjustments to its basic tier rate to include any bona fide external costs which are permissible under the Commission's rules. The City acted unreasonably by prohibiting Vantage from taking any external cost adjustments prior to July 6, 1994, and by limiting the types of external costs which Vantage could pass through to its subscribers. Therefore, we remand this portion of Vantage's Appeal to the City for resolution in accordance with the terms of this Order.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that those portions of Vantage's Appeal of the City's Local Rate Order regarding (a) Vantage's refund liability; (b) the date on which Vantage can begin taking external cost adjustments; and (c) the types of external costs which Vantage can pass through to its subscribers are REMANDED to the City for resolution in accordance with the terms of this Order.

9. IT IS FURTHER ORDERED that that portion of Vantage's Appeal of the City's Local Rate Order regarding the timing of Vantage's issuance of refunds to its subscribers is DISMISSED as moot.

10. IT IS FURTHER ORDERED that, in light of the resolution of its Appeal herein, the Request for Partial Stay filed by Vantage IS DISMISSED as moot.

11. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's rules (47 C.F.R. §0.321).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[13] *See Questions and Answers on Cable Television Rate Regulation*, Answer No. 17 (May 6, 1994).
[14] *See* Local Rate Order, at p. 2.
[15] 47 C.F.R. §76.922(d)(3)(vii).
[16] 47 C.F.R. §76.922(d)(3)(iv).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application of
H C Crown Corp. File No. CSR 4338-T

For Waiver of Section 76.502 of the
Commission's Rules, 47 C.F.R. § 76.502

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1994; Released: December 23, 1994

By the Chief, Cable Services Bureau:

1. On September 9, 1994, H C Crown Corp. ("HCC")[1] filed a petition for special relief (the "Petition") requesting a waiver of the Commission's anti-trafficking rule.[2] HCC seeks the waiver in order to consummate a transaction that involves cable systems that HCC has controlled for less than three years. HCC filed a supplement to its petition on October 27, 1994 ("the "Supplement"), a second supplement on December 2, 1994, ("the "Second Supplement") and a final informational supplement on December 8, 1994 (the "Third Supplement"). HCC's petition is unopposed.

2. *Legal and Regulatory Framework.* Section 617 of the Communications Act of 1934, as amended (the "Communications Act"), establishes a three-year holding requirement for cable systems and, with certain exceptions, restricts the ability of a cable operators to sell, or otherwise transfer ownership in a cable system, within a three year period following either the acquisition or initial construction of the system.[3] Section 617(b) of the Communications Act provides that in cases of sales of multiple systems, subsequent sales of one or more of those systems to a third party will be considered part of the initial transaction for purposes of the anti-trafficking provision.[4] Section 617(d) of the Communications Act provides the Commission with broad discretion to grant waivers in the public interest.[5]

3. In the *First Report & Order* in MM Docket No. 92-264, in which the Commission adopted rules implementing the statutory anti-trafficking provision, the Commission noted that the provision is intended to restrict profiteering transactions and other transfers that are likely to adversely affect cable rates or service in the local franchise area.[6] In particular, the anti-trafficking provision is aimed at deterring the acquisition of cable systems by individuals who are only interested in speculation or exploiting ownership in cable systems for short-term gain, through the quick resale of cable systems at an inflated per subscriber value.[7]

4. However, the Commission also noted that the anti-trafficking provision is not intended to inhibit investment in the cable television industry, or to delay or disrupt legitimate transactions involving that industry.[8] The Commission further recognized that application of a separate three-year holding period to each system owned by a particular multiple system operator ("MSO") may be inappropriate in some circumstances because common ownership may create economies of scale that benefit subscribers, and common ownership of nearby cable systems may create operating efficiencies and allow expansion of service to previously unserved areas.[9] Accordingly, the Commission determined that waiver applications will be looked upon favorably if two-thirds or more of the MSO's subscribers are served by systems owned for three years or more, and if the MSO transfers several systems in a single transaction in which two-thirds of the subscribers of the systems being transferred are served by systems the MSO owned for three or more years.[10] In addition, the Commission established procedures for permitting spin-offs of systems involved in MSO transfers without implicating the holding period.[11]

5. *Factual Background.* HCC owns all of the issued and outstanding stock of Crown Media, Inc. ("Crown").[12] Crown is a multiple system operator ("MSO") that owns or controls various entities, which in turn own and operate, or manage, approximately 64 cable systems in Missouri, North Carolina, South Carolina, Kentucky, Wisconsin, Minnesota, and Connecticut, which serve a total of 437,710 subscribers in over 300 franchises.[13] HCC states that it has entered into an agreement to sell its interest in Crown to CM Acquisition Corp. ("CMA").[14] CMA was formed by Charter Communications, Inc., CCA Acquisition Corp., and Charter Communications II, L.P., (collectively referred to as the "Charter entities") for the purpose of acquiring Crown.[15] According to HCC, upon consummation of CMA's acquisition of Crown, CMA proposes to transfer all of the Wisconsin and Minnesota cable systems to Marcus Cable Partners, L.P. ("Marcus"), and the remainder of the acquired cable systems to the Charter entities.[16] The parties represent that they want to consummate the transaction on January 4, 1995.[17]

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[1] HCC states that it is a subsidiary of H.A., Inc., which in turn is a subsidiary of Hallmark Cards, Inc. Petition at 3 n.3.
[2] 47 C.F.R. § 76.502.
[3] 47 U.S.C. § 537.
[4] 47 U.S.C. § 537(b).
[5] 47 U.S.C. § 537(d). *See also Implementation of Sections 11 & 13 of the Cable Television Protection and Competition Act of 1992 (Horizontal & Vertical Ownership Limits, Cross-Ownership Limitations & Anti-Trafficking Provisions), First Report & Order* (hereinafter "*First Report & Order*") ¶ 78, 8 FCC Rcd 6828, 6839 (1993) (MM Docket No. 92-264).
[6] *First Report & Order* at ¶ ¶ 11, 21, 36, 8 FCC Rcd at 6830-31, 6833.
[7] *Id.* ¶ 21, 8 FCC Rcd at 6831.
[8] *Id.* ¶ 21, 8 FCC Rcd at 6831.
[9] *Id.* ¶ 51, 8 FCC Rcd at 6836.
[10] *Id.* ¶ 52, 8 FCC Rcd at 6836; 47 C.F.R. § 76.502(g)(1).
[11] *First Report & Order* ¶ 55-56, 8 FCC Rcd at 6836; 47 C.F.R. § 76.502(e).
[12] HCC represents that it has no cable interests other than through its interest in Crown. Petition at 3.
[13] Petition at 3-4; Supplement, Attachment 1-A.
[14] Petition at 3.
[15] Second Supplement at 3.
[16] Petition at 4; Second Supplement at 3-5; Third Supplement at 1-2.
[17] Petition at 3.

6. According to HCC, as of the proposed January 4, 1995 closing date, two-thirds of the subscribers of the systems to be sold will have been served by systems owned or controlled by HCC for three or more years. More precisely, 345,056 out of a total of 437,710 subscribers (79%), will be served by systems that HCC has owned or controlled for three or more years.[18] However, as of the dates of the parties' agreements and the filing of the Petition, the two-thirds subscriber mark had not been reached.

7. HCC represents that the proposed transactions, particularly the subsequent transfers, will serve the public interest. HCC states that the Charter entities were formed by a former executive group of Cencom Cable Associates, a subsidiary of Crown, that brings considerable experience to the venture and expects to improve the systems' operations and management.[19] HCC further states that the Charter entities will achieve efficiencies through clustering in the St. Louis, Missouri area, which will reduce costs through: (a) use of regional managements and operations support; (b) reduced programming and equipment costs; (c) centralized data processing and billing operations, and (d) regional marketing, construction and technological enhancements.[20] HCC submitted a statement from an officer of Charter Communication, Inc., verifying the representation that the Charter entities do not anticipate that their acquisition of the systems will have any adverse impact on customer service or system rates.[21]

8. HCC submitted a similar verification statement from an officer of Marcus.[22] According to HCC, Marcus is a small MSO with systems in the midwest, primarily concentrated in Wisconsin. Consequently, Marcus' acquisition of HCC's systems in Wisconsin is expected to produce efficiencies of operation and maintenance, and economies of scale, including reduced repair costs, improved service using existing personnel and installation of newer technologies to larger populations.[23]

9. *Discussion.* HCC seeks a waiver of the anti-trafficking rule in order to transfer some 22 cable systems that it has owned or controlled for less than three years.[24] HCC's waiver request is premised upon the fact that the transfer of these 22 systems, which serve 92,654 subscribers, is part of a larger transaction involving approximately 65 cable systems and 438,000 subscribers in seven states.[25] As noted above, HCC represents that over two-thirds of the subscribers of the systems involved in the transaction will have been served by systems controlled by HCC for three years as of the proposed closing date.

10. Pursuant to Section 76.502(g) of the Commission's rules, we look favorably on waiver requests in which the MSO demonstrates that two thirds of the subscribers of the systems being transferred have been served by systems that have been owned or controlled by the transferring MSO for three or more years. In the *First Report & Order*, the Commission addressed the calculation of the holding period and determined the three-year period shall be measured from the date of acquisition through the proposed effective date of the closing of the transaction transferring control of the cable system.[26] The date of acquisition is defined as the effective date of the closing of the transaction in which the system was acquired.[27] The Commission also expressly noted that an agreement may be executed prior to the completion of the three-year holding period, but consummation may not occur until after expiration of the requisite holding period.[28] We will apply this same rationale to calculation of the holding period for purposes of the exception for MSO transfers. Consequently, it is immaterial that HCC and CMA executed an agreement to transfer the cable systems prior to a date when two-thirds of the subscribers in the affected systems had been served by HCC controlled systems for three years.

11. We find that HCC has demonstrated that the proposed transaction: (a) complies with the requirements for favorable treatment under Section 76.502(g)(1); (b) involves subsequent transfers as contemplated by Section 617(b) of the Communications Act and Section 76.502(e) of the Commission's rules; (c) does not adversely affect the policies underlying the anti-trafficking rule; (d) was not driven by a desire to engage in profiteering; and (e) is not expected to adversely affect cable rates or services in the affected franchise areas. We note that in connection with the subsequent transfers and proposed clustering by the Charter entities in the St. Louis, Missouri area and by Marcus in Wisconsin and Minnesota, HCC represented that there are five or more multichannel video programming distributors operating in those areas, including other cable MSO's and a wireless operator.[29] Based upon the information submitted, we will not further review this transaction from a competitive analysis perspective.

12. Based upon the totality of the evidence and for the reasons stated above, we find that grant of the requested waiver is consistent with the public interest and our obligations pursuant to Section 617(d) of the Communications Act.[30]

13. Accordingly, IT IS ORDERED that, pursuant to 47 C.F.R. § 0.321, the request for waiver of 47 C.F.R. § 76.502 IS GRANTED with respect to the proposed transfer of cable systems owned or controlled by H C Crown Corp., through Crown Media, Inc., to CM Acquisition Corp.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[18] *Id.* at 4.
[19] Second Supplement at 4.
[20] *Id.* at 4.
[21] *Id.*
[22] *Id.* at 5.
[23] *Id.* at 5.
[24] *See* Supplement, Attachment 1-B.
[25] *Id.*
[26] *First Report & Order* ¶ 47, 8 FCC Rcd at 6835.
[27] *Id.*
[28] *Id.* ¶ 48, 8 FCC Rcd at 6835.
[29] Third Supplement at 1-2.
[30] These waivers are subject to any necessary consents of local franchise authorities to the proposed transfers.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Lincoln Cablevision LOI-93-47
Lincoln, Nebraska

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In response to an FCC Form 329 complaint against Lincoln Cablevision ("Cablevision"), the Commission issued Letter of Inquiry 93-47 ("LOI") to Cablevision on December 13, 1993.[1] The LOI asked Cablevision to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. Cablevision responded to our LOI by letter dated January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming service.[2] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[3]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[4] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[5] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[6] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[7] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[8] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[9] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[10] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[11]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[12] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Lincoln Cablevision, LOI 93-47 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We note that there is a pending rate complaint proceeding involving Cablevision. We have issued a decision in that proceeding relating to the reasonableness of Cablevision's cable programming service rate through May 14, 1994. *Lincoln CableVision*, Lincoln, Nebraska, CUID NE0032, *Memorandum Opinion and Order: Benchmark Filing to Support Cable Programming Service Price*, FCC 94 -1152 (released November 9, 1994) (*"Cablevision Benchmark Order"*). For purposes of that Order, we treated Cablevision's "a la carte" offerings as not rate-regulated pending further review pursuant to the instant LOI. *Cablevision Benchmark Order*, ¶ 7, n.15. Any action with respect to the rate proceeding which we deem necessary as a result of this Order will be taken subsequently.

[2] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[3] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[4] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[5] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[6] *Id.*

[7] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

[8] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[9] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[10] H.R. Rep. No. 628 at 79.

[11] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[12] *Rate Order* ¶ 451.

III. FACTS

6. Before September 1, 1993, Cablevision's services included a 21 channel basic tier, called Broadcast TV Service, for $5.19 per month, an 18 channel cable programming service tier, called Cable Tier, for $13.96 per month, and a 10 channel programming service tier, called Cable Plus, for $6.95 per month.[13]

7. The following chart summarizes Cablevision's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Broadcast TV Service	21	$ 5.19
2. Cable Tier	18	$13.96
3. Cable Plus	10	$ 6.95
Total	49	$26.10

8. On September 1, 1993, the date our rate regulations became effective, Cablevision restructured its service offerings. Cablevision's restructured service offerings included a 21 channel basic tier, called Broadcast TV Service, for $10.91 per month and an 18 channel cable programming service tier, called Cable Tier, for $9.35 per month. It also began offering each of the ten channels comprising its former Cable Plus service on an individual basis at prices between $.25 and $2.00 per month.[14] These ten channels were also offered together as a package, called Cable Plus, for $4.95 per month. On November 1, 1994, Cablevision added another channel which could be obtained individually and as part of the Cable Plus package.[15] The price of the package did not change.[16]

9. The following chart summarizes Cablevision's service tier options as of the date of its response to our LOI:[17]

Offering	Channels	Price
1. Broadcast TV Service	21	$10.91
2. Cable Tier	18	$ 9.35
3. Cable Plus Package	11	$ 4.95
Total	50	$25.21

10. Cablevision argues, *inter alia*, that it began offering its Cable Plus services individually in order to maximize consumer choice. However, based on this record, relatively few consumers elected to exercise choice of the individual channels. Cablevision's Response indicates that, as of December 31, 1993, 7,902 customers receive the Cable Plus package, while 771 subscribers purchase one or more individual channels.[18]

IV. DISCUSSION

11. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[19] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[20] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[21] First, we examine whether Cablevision's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate regulated.

12. The table of Cablevision's service tier options as of the date of our LOI set out in paragraph 9 above almost mirrors the table in paragraph 7 that shows its service tier offerings prior to restructuring. Both before and after restructuring its service offerings Cablevision offered its subscribers a 21 channel basic service tier and an 18 channel cable programming service tier. In addition, Cablevision offered a second cable programming service tier consisting of 10 channels, which became an 11 channel package after restructuring. However, a significant difference is not reflected at all in the charts; the 11 channel Cable Plus package offered after restructuring is offered as a tier of service whose prices would not be subject to rate regulation. Cablevision fundamentally changed its service to subscribers by removing ten channels from rate regulation, thereby eliminating an entire cable programming service tier. In so doing, Cablevision avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Cablevision had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Order* we released on May 3, 1993, which generally required cable operators to reduce their rates.

13. We believe that Cablevision has not provided a sufficient justification for this change to overcome our finding that there is an evasion of rate regulation. To the contrary, virtually all of Cablevision's subscribers to its former cable programming service tier were given the package of identical channels. (Few subscribers actually subscribed to in-

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[13] The Cable Plus package at the $6.95 price also included a remote and addressable converter.

[14] The channels and monthly prices are as follows: Prime Sports Network--$1.30; American Movie Classics--$1.00; Court TV--$.50; Country Music TV--$.75; The Travel Channel--$.25; Nostalgia--$.25; Science Fiction Channel--$.50; Learning Channel--$.50; E! Entertainment--$.50; Encore--$2.00. In addition to being offered as part of the Cable Plus cable programming service tier, Encore had previously been available individually for $2.00 per month.

[15] The new channel was ESPN II and was available on an individual basis for $1.30 per month.

[16] Cablevision states that it offers to its subscribers certain movie offerings such as HBO and Showtime and that customers who subscribe to these movie offerings also receive the same channels that comprise the Cable Plus offering, with the exception of Encore, for no additional charge. This Order addresses only the Cable Plus package and does not address the movie channel packages. We reserve the right to subsequently review the movie channel packages and to take any action with respect to Lincoln's rate proceeding (including reopening it) that we deem appropriate as a result of such review.

[17] This Order does not evaluate Cablevision's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings. *See* fn.1, *supra*.

[18] The most heavily subscribed individual channel in the Cable Plus package as of December 31, 1993, was Prime Sports Network which was purchased a la carte by 268 customers. In addition, Cablevision states that an additional 18,642 subscribers received the Cable Plus package for free with the purchase of a premium channel.

[19] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[20] *Rate Order* ¶ 451.

[21] *Id.* at ¶ 453.

dividual channels instead of the Cable Plus package; at most, only 9 percent of Cablevision's subscribers who took any part of the Cable Plus package subscribed to individual channels). Other than an attempt to evade rate regulation, there appears to be no sufficient justification for this restructuring.

14. Other factors corroborate our finding that Cablevision's restructuring had the effect of evading rate regulation. First, Cablevision discontinued its Cable Plus cable programming service tier entirely and moved all the channels comprising it to the new Cable Plus package on the eve of regulation. Second, its Response suggests that it automatically subscribed existing Cable Plus customers to the September 1, 1993 Cable Plus package. In light of these facts, we find that Cablevision's restructuring of its offerings constituted an evasion of our rate regulation rules.

15. Because Cablevision's restructuring is a purported collective offering of a la carte channels, we also must determine whether the offering met the Commission's requirements for a permissible collective offering of a la carte channels. If the offering met the Commission's requirements for a permissible collective offering of a la carte channels, then Cablevision would not have evaded our rate regulations because it would not have been required to reduce its price for the collective a la carte package.[22]

16. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[23] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[24] This is not the type of offering that Cablevision and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

17. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with arealistic service choice."[25]

18. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the eleven services, because the sum of the per channel prices (as of November 1) is $8.85, in contrast to the package price of $4.95. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of Cablevision's submission reveal that approximately 91 percent of the subscribers who take any part of the Cable Plus service take the whole package.[26] This fact, together with the other factors present in this case,[27] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

19. Even if we were to apply the 15 interpretative guidelines set forth in our *Second Reconsideration Order*,[28] we still would conclude that Cablevision's offering does not constitute a realistic service offering. Cablevision's submission reveals additional evidence weighing against a finding that its individual a la carte channels constitute a realistic service offering. The most important factor, of course, is that "an entire regulated tier has been eliminated and turned into an 'a la carte' package."[29] Moreover, a "significant percentage" ofchannels in the package "were removed from regulated tiers," which would "weigh against unregulated treatment."[30] In this case, approximately 91 percent of the channels in the package were removed from

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[22] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore generally will be subject to our rate regulation rules. However, in order to determine whether Cablevision evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[23] *Rate Order* ¶ 329.

[24] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[25] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order")*, the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[26] This calculation does not include the 18,642 subscribers that receive the Cable Plus package for free with the purchase of a premium channel.

[27] *See, e.g.*, ¶ ¶ 12-14, *supra*.

[28] *Second Reconsideration Order* at ¶ 196.

[29] *Id.*

[30] *Id.*

a regulated tier. (ESPN II is the only one of the eleven channels in the Cable Plus package that was not removed from a regulated tier.)[31]

20. In our recently adopted *Going Forward Order,* we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order,* we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible.

21. We do not believe, however, that our a la carte rules are unclear as applied to the fact pattern at issue in this case. In the *Rate Order* we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate-regulated tier an a la carte package.[32] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning [it] into an a la carte package."[33] This, however, is exactly what Cablevision did by moving ten channels to an allegedly unregulated package and eliminating an entire cable programming service tier. While we have acknowledged that aspects of our evaluation of a la carte packages were unclear,[34] as applied to these particular facts, this prong of the test is clear and requires no additional guidance or explanation from the Commission. In light of the fact that it is clear that elimination of an entire regulated tier and transformation of that tier into an a la carte package is an evasion of rate regulation, we find that Cablevision's retiering in fact clearly constitutes just such an evasion.[35]

22. We find that Cablevision's Cable Plus package, as the offering existed in Lincoln, Nebraska on December 13, 1993, the date of our LOI, must be treated as a rate-regulated cable programming service tier. As a result, effective 90 days from the release date of this Order, Cablevision must either offer the channels in this package as part of the respective rate-regulated tiers from which they came or offer the channels collectively as a separate rate-regulated tier of cable programming service.[36] We further conclude that this package is a rate-regulated offering as of September 1, 1993, and that the channels composing it must be counted as rate-regulated channels for purposes of rate justification as of that date.

V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that Cablevision's Cable Plus package is subject to rate regulation as of September 1, 1993, and the channels composing it must be counted by Cablevision as rate-regulated channels for purposes of rate justification, as of that date.

24. IT IS FURTHER ORDERED that, effective 90 days from the release date of this Order, Cablevision must either offer these channels as part of the respective rate-regulated tiers from which they came or offer the channels collectively as a separate rate-regulated tier of cable programming service.

25. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[31] *See* fn.14, *supra.*

[32] *Rate Order* ¶ 328 n.808.

[33] *Second Reconsideration Order* ¶ 196.

[34] *See Warner Cable Communications,* Milwaukee, Wisconsin, LOI-93-14, DA 94-1276 (released November 18, 1994).

[35] *See Adelphia Cable Partners,* L.P., South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[36] To provide 90 days gives Cablevision ample time to comply with the 30 day notice provisions of our regulations for rate and programming changes. *See* 47 C.F.R. §§ 76.309(c)(3)(i)(B), 76.932 and 76.964. Cablevision, of course, may continue to offer any channels as single channel offerings consistent with the 1992 Cable Act and our rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

License Renewal Application of Central Illinois Broadcasting Company For Station WWCT(FM) Peoria, Illinois — File No. BRH-890801XT

MEMORANDUM OPINION AND ORDER AND NOTICE OF FORFEITURE

Adopted: January 9, 1995; Released: February 14, 1995

By the Commission: Commissioner Quello concurring in the result.

I. INTRODUCTION

1. The Commission has before it for consideration: (i) a Petition by the Illinois State Conference of Branches of the NAACP, including its respective branches (hereinafter NAACP), requesting, among other things, that the Commission reconsider both its decision not to grant the NAACP petitioner status and its decision to grant Central Illinois Broadcasting Company's renewal application, as set forth in *Applications of D.W.S., Inc.*, 7 FCC Rcd 7170 (1992) (*D.W.S.*); (ii) the licensee's opposition to the petition; (iii) the NAACP's reply to the opposition; (iv) a Notice of Apparent Liability (NAL) of forfeiture for $10,000 issued on September 21, 1992, to Central Illinois Broadcasting Company, licensee of Station WWCT(FM), Peoria, Illinois, as part of the Commission's disposition of the NAACP's petition to deny filed against that station, *D.W.S., supra;* (v) a March 16, 1990, letter denying the NAACP standing as to WWCT(FM) and (vi) various other pleadings.

2. First, the NAACP requests that the Commission reconsider its decision to deny the NAACP standing as a petitioner against WWCT(FM). Second, the NAACP alleges that WWCT(FM) violated the Commission's Equal Employment Opportunity (EEO) Rule and policies and that the Commission erred when it granted the station's renewal application. It requests that the Commission reconsider its decision, designate the renewal application for hearing and thereafter deny it. For reasons discussed below, we dismiss the NAACP's petition for reconsideration and affirm our original grant of the renewal application. In addition, we will impose a Notice of Forfeiture in the amount of $10,000 for EEO violations occurring at Station WWCT(FM).

II. STANDING

3. On August 1, 1989, the license renewal application for WWCT(FM) was filed at the Commission. Petitions to deny the renewal application were due to be filed on or before November 1, 1989. 47 C.F.R § 73.3584. On November 1, 1989, the NAACP filed a petition to deny against WWCT(FM). Attached to the petition was a certificate of service in which the counsel for the NAACP certified that a copy of the petition had been delivered on November 1, 1989, to Edward Reddy, Esquire, counsel for WWCT(FM). On December 19, 1989, the licensee WWCT(FM) filed a Motion for Return of Petition to Deny stating that Edward Reddy had never represented the licensee and that neither it nor its actual attorney, Lawrence Bernard, Jr., Esquire, had been served with the NAACP's November 1, 1989, petition to deny. Therefore, it argued that the petition should be returned without consideration because the NAACP failed to timely serve a copy of the petition to deny on the licensee as required by Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1) and Section 1.47 of the Communications Act, 47 C.F.R. § 1.47. On December 29, 1989, the NAACP filed an opposition to this motion in which it admitted to serving the wrong attorney but argued that the motion should be denied because the licensee had received notice of the petition, was therefore not prejudiced by the NAACP's erroneous service and the NAACP service error was made in good faith.[1] In support of its argument, the NAACP cited several Commission cases. However, our review indicated that these cases were factually distinguishable from the present case and, therefore, unpersuasive. On March 16,1990, the Commission sent a letter to the licensee, sending additional copies to its attorney and the NAACP's counsel, stating that the NAACP would be considered an informal objector against WWCT(FM) because the NAACP's petition was procedurally defective as to WWCT(FM). Letter from Charles W. Kelley, Chief, Enforcement Division, to Bruce T. Foster, President, Central Illinois Broadcasting Co., Inc., (March 16, 1990). In *D.W.S.*, the Commission upheld this ruling.

4. In its petition for reconsideration, the NAACP requests that the Commission reconsider its decision and grant it standing as petitioner. It puts forth the same arguments as in its December 29, 1989, pleading and these arguments have already been considered and rejected by the Commission. Although it also cites several additional Commission decisions in support of those arguments, we find these cases to be factually distinguishable from the present case and, therefore, unpersuasive. In *United Communications Corp.*, 54 RR 2d 22 (1983) and *Dena Pictures, Inc.*, 90 FCC 2d 105 (1982), the document in question was properly mailed but never delivered. In *KSAY Broadcasting Co.*, 45 FCC 2d 348 (1974), parties were served only four

[1] The NAACP states that the reason it served the wrong attorney was that, in the Commission's reference room file on WWCT(FM), the only document identifying an attorney for the station was a June 2, 1982, letter, filed by Robert Healy, Esquire. The NAACP served the first listed partner, Edward Reddy, at the firm to which Robert Healy belonged. The NAACP maintains that "the reference room copy of the renewal application did not bear a copy of [the licensee's actual attorney's] cover letter." However, we note that staff review of the file in question revealed that such a cover letter was attached to the renewal application filed on August 1, 1989. (There are in fact three copies of the letter in the reference room file.)

days late. In *Tri-Cities Broadcasting Co.*, 3 RR 2d 1021 (1964), although its legal counsel was not served, party's engineering counsel was served and the Commission stated that a bona fide effort was made to adhere to the requirements of the Commission's Rules. Thus, in each of the above-cited cases, there was a good faith effort to comply with the Commission's Rules. In contrast, as discussed in para. 3, *supra*, the NAACP in the instant case never mailed or otherwise served notice on the licensee. Moreover, there do not appear to be any acceptable extenuating circumstances for the NAACP's failure to serve the licensee, *see supra* note 1. An additional case cited by the NAACP did not involve the service of a petition to deny on a licensee. In *Newton Broadcasting Co.*, 38 FCC 865 (1965), the Commission found that, despite a delay in filing, a hearing examiner had properly granted a party's petition for leave to amend its application for authority to construct and operate new broadcast stations.

5. Because we are denying the NAACP's request to overturn our previous decision regarding its status as an informal objector, it has no standing to bring this petition for reconsideration of our decision involving WWCT(FM). Therefore, its petition against the station is dismissed. 47 C.F.R. § 1.106(b)(1). *Redwood Microwave Association Inc., Mount Sanhedrin, Pratt Mountain and Mt. Pierce, California*, 61 FCC 2d 442 (1976); *Montgomery County Broadcasting Corp., Montgomery City, Missouri*, 65 FCC 2d 875 (1977); *University of North Carolina*, 4 FCC Rcd 2780 (1989).

III. NOTICE OF FORFEITURE

6. In *D.W.S., supra*, the Commission sets out a record of inadequate EEO efforts at WWCT(FM). Review of the station's renewal application and inquiry response revealed that the licensee failed to attract qualified minority applicants; failed to hire any minorities for its 13 hiring opportunities; and failed to alter its list of recruitment sources or otherwise self-assess its EEO program in any meaningful way.

7. The licensee's payment or response was due October 21, 1992. It has not yet responded to the September 21, 1992, NAL. Therefore, the Commission imposes a Notice of Forfeiture for $10,000 on WWCT(FM).

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the petition for reconsideration filed by the NAACP against WWCT(FM) IS DISMISSED.

9. IT FURTHER IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), that Central Illinois Broadcasting Company FORFEIT to the United States the sum of ten thousand dollars ($10,000) for violation of the Commission's EEO Rule. 47 C.F.R. § 73.2080. Full payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission within 30 days of the release date of this Order. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80 and Section 504(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 504(a), as summarized in the attachment to this Memorandum Opinion and Order and Notice of Forfeiture.

10. IT IS FURTHER ORDERED that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this *Memorandum Opinion and Order and Notice of Forfeiture* to all parties.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-91

In the Matter of

Open Network Architecture Tariffs
of Bell Operating Companies

ORDER

Adopted: January 26, 1995; Released: February 14, 1995

By the Commission:

I. INTRODUCTION

1. Before the Commission are two petitions filed by MCI Telecommunications Corporation (MCI), requesting reconsideration of two related Commission orders resolving an investigation of the initial Open Network Architecture (ONA) tariffs filed by six of the Bell Operating Companies (BOCs).[1] In the *ONA Investigation Final Order*, the Commission determined that the BOCs' initial ONA rates were unlawful, directed them to file replacement rates based upon altered ratemaking methodologies, and terminated the investigation except with respect to US West.[2] In the companion *SCIS Disclosure Review Order*,[3] the Commission denied MCI's application for review of procedures adopted by the Common Carrier Bureau in the *SCIS Disclosure Order*[4] to provide intervenors access under nondisclosure agreements to proprietary cost support, the software used to create it, and related materials.[5] MCI's central contention in each petition is that these procedures denied it meaningful participation in the investigation. For the reasons explained below, we deny both petitions.

II. BACKGROUND

2. Implementation of Open Network Architecture required that existing feature group access arrangements be unbundled, and that new access charge subelements, known as basic service elements (BSEs) and basic serving arrangements (BSAs), be established pursuant to the Commission's decision in the *Part 69 ONA Order*.[6] That order required carriers to submit engineering studies, time and wage studies, or other cost accounting studies to identify direct costs, and to provide: (1) a projection of costs for a representative 12-month period; (2) estimates of the effect of the service on the carrier's traffic and revenues, including the traffic and revenues of other services; and (3) supporting workpapers for estimates of costs, traffic, and revenues.[7] Carriers used proprietary engineering models to develop the specific costs associated with providing particular BSEs. This was necessary because a reasonable, internally consistent allocation of switching component costs among the multiple BSEs that individual components support requires recognition of the extent to which each BSE consumes a specific component's capacity. The component resources used to provide individual BSEs in turn reflect the proprietary design and performance characteristics of individual switch technologies.[8]

3. While the rules that govern review of tariffs filed by dominant carriers generally require public access to cost support material, in the unique circumstances posed by ONA implementation the Commission balanced the need for public access with the competing interests of carriers and switch vendors in protecting confidential financial materials. The unrestricted disclosure in this proceeding of

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[1] MCI filed both these petitions on January 14, 1994. On January 27, 1994, Sprint Communications Company, L.P. (Sprint) filed comments supporting MCI's SCIS-related petition, and Allnet Communications Services, Inc. (Allnet) filed comments supporting both of MCI's petitions. On the same date the Ameritech Operating Companies (Ameritech), New England Telephone and Telegraph Company and New York Telephone Company (NYNEX), Southwestern Bell Telephone Company (SWBT), filed oppositions to the SCIS-related petition, seeking its dismissal; the same three BOCs filed separate oppositions to the merits of MCI's *ONA Investigation Final Order* petition. BellSouth Telecommunications, Inc. (BellSouth) filed oppositions to both MCI petitions. US WEST Communications, Inc. (US WEST) the same day filed a motion to dismiss the SCIS-related petition, and a separate opposition to the *ONA Investigation Final Order* petition. MCI replied to these oppositions in separate replies filed February 8, 1994.

[2] Open Network Architecture Tariffs of Bell Operating Companies, Order Terminating Investigation, CC Docket No. 92-91, 9 FCC Rcd 440 (1993) (*ONA Investigation Final Order*).

[3] Commission Requirements for Cost Support Material to be Filed with Open Network Architecture Access Tariffs, 9 FCC Rcd 180 (1993) (*SCIS Disclosure Review Order*). This Order is referred to in the *ONA Investigation Final Order* as the *SCIS Disclosure Reconsideration Order*.

[4] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (Com. Car. Bur. 1992) (*SCIS Disclosure Order*).

[5] We refer to these proprietary software models by the acronym SCIS, which refers to the Bellcore-developed Switching Cost Information System. US WEST originally used SCIS to develop cost support only for some of its BSEs, and used its own proprietary model for the cost support for its other BSEs. Because the US West tariffs were found unlawful, US West has since refiled its proprietary cost model. The issues raised by MCI's petitions are limited in scope to the investigative treatment of the SCIS model and related materials.

[6] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*), *modified on recon.* 7 FCC Rcd 5235 (1992), *further modified on recon.*, 8 FCC Rcd 3114 (1993).

[7] *Part 69 ONA Order*, 6 FCC Rcd at 4531 (para. 42). Cost support requirements were further specified in Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 6 FCC Rcd 5682 (Com. Car. Bur. 1991).

[8] A summary of the considerations justifying carriers' use of proprietary cost support materials in the ONA investigation appears in the *ONA Investigation Final Order*, 9 FCC Rcd at 469-471 (paras. 78-83), and a more detailed analysis is in the *SCIS Disclosure Order*, 7 FCC Rcd at 1535-36 (paras. 52-56).

cost support that includes switch vendors' proprietary material would almost certainly have terminated the vendors' provision to Bell Communications Research, Inc. (Bellcore) and US West of proprietary data needed to develop and update the engineering models used to allocate costs.[9] Current vendor data is needed both to assure the analytic integrity of the software model's design, and the accuracy of data the model refers to when performing investment studies. Accordingly, the Commission determined to develop procedures that would enable the maximum public access consistent with assuring the continued participation of switch vendors in the cost modeling process.

4. As an initial step, Bureau staff reviewed *in camera* the complete, unredacted software and related data used by Ameritech, which was the first carrier to submit its ONA tariff filing, both to determine whether these materials were exempt from mandatory disclosure under the Freedom of Information Act (FOIA) and to develop a better understanding of the role played by SCIS in the overall ONA ratemaking process. In the *SCIS In Camera Order*, the Bureau determined that SCIS and related materials were exempt from mandatory disclosure under the FOIA, and ordered all BOCs other than Ameritech to submit unredacted software for *in camera* examination by Bureau staff. In the subsequent *ONA Designation Order*, the Bureau designated investigation issues for all BOCs, including several focused on the use of software models.[10] Because the issues involving the validity and behavior of software models used to calculate investment associated with specific BSEs required review both of proprietary software and the design and performance information supplied by switch vendors, these issues necessitated development of a protected disclosure procedure to enable participation by intervenors.

5. When the BOCs, Bellcore, intervenor parties and switch vendors were unable to agree upon a method for inspection of the confidential portions of the cost support exhibits, the *SCIS Disclosure Order* specified procedures for redaction of these materials, including the types of material to be protected; ordered that the redacted versions be provided to intervenors; and required carriers to retain an independent auditor to review the cost models and other aspects of their ratemaking processes. The initial response by Bellcore to those instructions was unsatisfactory and further informal negotiations between Commission staff, the BOCs, Bellcore and switch vendors led to the development of a second edition of redacted software, referred to as "Redaction II."[11] MCI and other intervenors who signed a nondisclosure agreement were permitted to work with this redacted software at Bellcore and US West premises,[12] and to observe firsthand the variation in software model outputs generated by changes in inputs.

6. At the same time, the independent auditor retained by the BOCs, Arthur Andersen and Company, undertook an extensive review of the software model's internal validity and the sensitivity of its results to alterations in specified data inputs -- *i.e.*, how changes in data put into the model affect the investment data generated by the model.[13] The specifications for this review were provided informally by Bureau staff to Bellcore, carrier representatives, and the auditor, and then confirmed by the auditor in writing.[14] The resulting report was submitted to Bureau staff with sensitive material included, and a redacted version of that report was then given to intervenors, who were afforded an opportunity to submit additional questions to the auditor based on their examination of the report.

III. SUMMARY OF MCI PLEADINGS

7. In essence, MCI contends in both its petitions that the procedures described above were insufficient to afford it meaningful participation in the investigation. In its petition addressing the *ONA Investigation Final Order*, MCI generally recites its past objections to computerized cost models and claims that the redacted versions of SCIS software were not useful. MCI Petition (*ONA Investigation Final Order)* at 2. MCI asserts that, because of inadequate disclosure procedures, the intervenors were unable to perform necessary sensitivity analyses and were prevented from raising the issues such analyses would have suggested. *Id.* at 3-6. MCI argues that the resulting ratemaking violates Sections 201-205 of the Communications Act, as well as the Administrative Procedure Act and constitutional due process. MCI Petition (*ONA Investigation Final Order)* at 6-7. MCI says that the Commission failed to explain why SCIS deserves "special protection" in this proceeding compared to the access provided in state proceedings. MCI Petition (*SCIS Disclosure Review)* at 2-4.

8. MCI also contends that, by focussing narrowly on the Redaction II software, the *SCIS Disclosure Review Order* glosses over other impediments to intervenor participation, including: (a) the application of the Model Nondisclosure Agreement (MNA) to all competitively sensitive information other than SCIS; (b) the restricted number of experts allowed access to sensitive materials; (c) copying provisions; and (d) scope of communication between intervenors. MCI states that the Commission has failed to justify restricting access to materials other than software models, such asthe Andersen reports, that contain no technology-specific proprietary data. MCI Petition (*SCIS Disclosure Review)* at 4-7. Finally, MCI contends that the *SCIS Disclosure Review Order* mischaracterized the position it took in its application for review about the copying restrictions in the MNA. *Id.* at 8.

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[9] *SCIS Disclosure Order*, 7 FCC Rcd at 1529 (paras. 17-19).

[10] Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, 7 FCC Rcd 2604 (Com. Car. Bur. 1992)(*ONA Designation Order).*

[11] The first edition of redacted software is referred to as "Redaction I." (Changes developed between Redaction I and Redaction II, as well as necessary limits on intervenor access to some aspects of SCIS inputs, are described in the *SCIS Disclosure Review Order*, 9 FCC Rcd at 181 (paras. 6-7).)

[12] US WEST's initial ONA rates were developed from cost studies based on the SCIS model and on cost studies that used the Switching Cost Model (SCM) developed by US WEST.

[13] For example, by varying the cost of money and running a new study on that basis, the investment figures for specific BSEs that SCIS generates will change to reflect the changing cost-of-money assumption.

[14] Letter from James E. Farmer, Arthur Andersen & Co., to Richard M. Firestone, Chief, Common Carrier Bureau, March 5, 1992 (*March 5 Letter).*

IV. COMMENTS AND OPPOSITIONS

9. In comments supporting both MCI petitions, Allnet states there was no reason for requiring any party to enter into non-disclosure agreements to view redacted software materials from which confidential information had been redacted, and that the redacted information itself should have been made available to parties that signed a non-disclosure agreement. Allnet contends that the private conversations between the BOCs and the FCC violate the APA and the Communications Act. Allnet Comments at 1-2. Sprint asserts, in comments supporting MCI's *ONA Investigation Final Order* petition, that "secret ratemaking" prevented interested parties from evaluating the BOCs' ratemaking process; that the protective arrangements adopted in the ONA investigation go beyond past Commission practice; and that the investigation should be reopened in a manner permitting "meaningful participation" by intervenors. Sprint Comments (*ONA Investigation Final Order)* at 1-3. Sprint separately supports the second MCI petition, asserting the Commission misread or overlooked substantial portions of MCI's original application for review of the *SCIS Disclosure Order,* and has not explained its decision to, *e.g.,* prohibit interaction between intervenors on redacted Andersen reports. Sprint Comments (*SCIS Disclosure Review)* at 1-2.

10. The BOCs state that MCI's SCIS-related petition should be summarily dismissed for failing to raise new facts or changed circumstances as required by Section 1.106 of the Commission's Rules. *See, e.g.,* Ameritech Opposition (*SCIS Disclosure Review)* at 1-2. In separate oppositions to MCI's *ONA Investigation Final Order* petition, they also contend that MCI has had substantial opportunity to review and comment on both ONA rates and methodology. *See, e.g.,* Ameritech Opposition (*ONA Investigation Final Order)* at 1-3.

11. US WEST states that the *ONA Investigation Final Order* petition fails to request cognizable relief, and is grounded on conclusions unsubstantiated by facts other than the "undeniable" limitation of MCI's access to confidential information. US WEST Opposition (*ONA Investigation Final Order)* at 1-3.[15]

V. DISCUSSION

12. As a threshold matter, we deny US WEST's motion to dismiss MCI's petition of the *SCIS Disclosure Review Order* because it raises no new facts or changed circumstances and is thus defective under Section 1.106 of our Rules, 47 C.F.R. § 1.106. The determinations made in the *SCIS Disclosure Review Order* address the threshold question whether Bureau procedures for providing public access to proprietary cost support enabled development of a public record adequate to justify the decision reached in the investigation. The Order thus resolves procedural issues that underlie the substantive decisions made in the *ONA Investigation Final Order.* Treating MCI's petitions directed at the two orders as conceptually distinct would fail to recognize this linkage between the orders. Therefore, although many of MCI's arguments are in fact similar to those it made in its application for review of the Bureau's *SCIS Disclosure Order,* we deny US WEST's motion in the interest of a full and comprehensive consideration of MCI's contentions regarding the final outcome of the ONA tariff investigation.

13. *General.* We begin by acknowledging the importance of the public policies cited by MCI. FOIA reflects a strong commitment to the widespread availability of government records, subject, however, to several important exceptions. The Administrative Procedure Act and the Due Process Clause of the Constitution generally entitle parties in administrative proceedings to have access to the documents necessary for effective participation in those proceedings. We are confident that our determination in the Orders MCI seeks to have reconsidered did not violate these precepts.

14. As explained in the *SCIS Disclosure Review Order,* the Commission accorded full weight both to the intervenors' interests in examining cost support information in the ONA tariff investigation, and to the switch vendors' interests in protecting proprietary information. Following the initial, *in camera* review of confidential cost support conducted by Commission staff, the *SCIS Disclosure Order* required the BOCs to prepare a redacted version of the SCIS software and associated documentation to enable intervenors to participate as fully as possible in the investigation. The redaction process went through two successive editions, and intervenors also had access to the redacted version of the independent auditor's report.[16] MCI and other intervenors were accorded adequate opportunity to participate in this investigation by these procedures, and raised several specific questions regarding the reasonableness of SCIS investment studies. *See* para. 19, *infra.* MCI states in its Reply on the *ONA Investigation Final Order,* at 3 n.6, that one of its staff experts was able to view more of SCIS in two state proceedings than permitted by the Commission in this proceeding. Even if true, state proceedings do not govern federal procedures; the Commission must reach its own determination of the relative weight to be accorded the need for disclosure and the need to protect confidentiality, under applicable federal statutes and regulations. These criteria are summarized and implemented in the *SCIS Disclosure Order,* 7 FCC Rcd at 1531 (paras. 28-29).

15. The Commission did believe it necessary to restrict public participation in the tariff review process in the circumstances of this case to protect confidential financial information. As noted in para. 3, *supra,* disclosure of proprietary materials would jeopardize access to vendor-provided data and thus call into question the continued validity of the investment models and the Commission's ability to review BSE rates for a reasonable, consistent relationship to underlying costs. The limitation on public access was, however, explicitly limited to the unique circumstances posed by the ONA investigation. [17]

16. *Intervenor Access to Redacted Materials.* MCI's contentions directed at the *SCIS Disclosure Review Order* limiting intervenor access to redacted materials, and more generally directed toward restrictions on intervenor partici-

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[15] US WEST's motion to dismiss MCI's SCIS-related petition is considered at paragraph 12, *infra.*

[16] *SCIS Disclosure Review Order,* 9 FCC Rcd at 180 (para. 3), 182 (para. 9).

[17] *ONA Investigation Final Order,* 9 FCC Rcd at 469 n.163.

pation, are stated in conclusory terms and raise no factual or legal considerations not already raised and considered in the *SCIS Disclosure Review Order* and *ONA Investigation Final Order*. The *SCIS Disclosure Order* did not consider the application of the Model Nondisclosure Agreement (MNA) to proprietary materials other than those related to SCIS review, and MCI's application for review did not raise the issue of MNA treatment of other than SCIS-related materials. The focus of the *SCIS Disclosure Review Order* on MNA treatment of the redacted SCIS software relates directly to the concerns expressed in MCI's application for review. MCI has merely asserted that this focus was not a "rational response" to MCI's arguments. As for MCI's specific concerns about the "one attorney, two experts" restriction, copying restrictions, and restrictions on intervenor communications, each of these issues is fully addressed in the *SCIS Disclosure Review Order*. We need not address MCI's contentions again here.

17. *Sensitivity Analyses and Intervenors' Questions.* MCI contends that it could not perform any sensitivity analyses even using Redaction II, and thus was prevented from meaningful participation in the tariff investigation. MCI Petition (*ONA Investigation Final Order)* at 3-5. We disagree. Redaction II allowed intervenors to participate in a useful manner in the ONA investigation because Redaction II software permitted intervenors to observe the SCIS model's functioning and its specific responsiveness to altered inputs, including, *e.g.*, percentage fill of lines, projected schedule for switch exhaustion, and cost of money. This expectation was confirmed by Bureau staff, who had full access to the redacted software. Redaction II enabled each intervenor to interact with the SCIS software used to develop the costs associated with using a particular type of switch technology to provide specific BSEs. In contrast with the initial redaction, however, the second redaction relied on actual vendor data and' included, for each BOC, model offices (paradigms developed from the characteristics of actual BOC offices) that accurately reflected the particular carrier's reliance on a specific switch vendor's technology as a basis for developing ONA rates. The second redaction also included, for each BOC, the several specific version(s) of SCIS used.[18] This enabled intervenors to isolate and quantify the discrete effect on SCIS cost studies of using a more or less recent version of the software, as well as several different input variables.[19] While intervenors were not provided the range of SCIS investment variables for specific switch types in those instances for which disclosing such data would compromise confidential materials, the intervenors were able to select hypothetical values for such ranges and observe the quantitative effect of altering the values set for those variables, as well as to vary the other SCIS inputs for which the range of actual values was disclosed.

18. In its only effort to substantiate its assertion that sensitivity analyses were not possible MCI stated that, if it did not see actual input values, a BOC could develop almost any cost it wanted through SCIS, without being reviewable by intervenors. MCI Petition (*ONA Investigation Final Order)* at 4. The range of permissible values for some SCIS inputs was not disclosed at switch vendors' request, but the redacted software did generally permit intervenors to supply different values for these inputs and to quantify the extent to which such changes affected the model's outputs. While intervenors thus could not discover the specific design, cost or performance attributes implicitly disclosed by therange of values for a particular input, they were nevertheless able to change hypothetical values and observe the effect on outputs (*i.e.*, unit investment data for BSEs), and so determine whether particular variables had the potential to significantly affect investment studies. The only input variables excluded from this procedure were negotiated switch price discounts and right-to-use costs; intervenors were not permitted to vary those values, in order to eliminate the chance of discovering proprietary switch price information.[20] The access provided to MCI and other intervenors thus permitted a valid review of the model's sensitivity to changes in various inputs, while protecting switch vendors' sensitive competitive data from public disclosure.

19. Parties were able to raise specific questions on cost and rate development on the basis of sensitivity analyses, despite MCI's protests to the contrary. Although intervenors were not provided full access to all data and software, the redacted software provided intervenors did enable the analysis cited in the *ONA Investigation Final Order*, and so allowed intervenors to raise specific, meaningful questions to the auditor.[21] For example, the intervenors sought a comparison of investment study results generated by different editions of SCIS, and this request was referred to Andersen for sensitivity analysis. The

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[18] As explained in the *ONA Investigation Final Order*, SCIS is periodically updated to reflect changes in switch design, cost, and performance, including the replacement by vendors of generic software used to operate the switch. Such changes may affect the investment data generated by a SCIS study. For example, for the 5ESS switch, intervenors had a total of seven versions of SCIS from which to run version-specific sensitivity analyses.

[19] MCI refers generally to "user inputs," which we understand to mean the factual assumptions and methodological options that SCIS requires the operator to choose among. *See* para. 6, *supra*. As the analysis in the *SCIS Disclosure Order* makes clear, however, different input parameters involve different tradeoffs between public access and the risk of disclosing proprietary materials. That Order specifically required that BOC input parameters be disclosed to parties signing the nondisclosure agreement, excepting only inputs "that allow the extraction of data that is competitively sensitive to switch vendors." SCIS Disclosure Order, 7 FCC Rcd at 1536-37 (paras. 58-59). Consequently, the range of analog or digital lines or trunks that could be terminated on a specific switch, for example, was not disclosed. The only other input ranges not disclosed were switching module memory adjustment, the right-to-use dollars per switching module, and the coefficient of variation.

[20] *SCIS Disclosure Review Order*, 9 FCC Rcd at 181 n.16.

[21] Questions referred to the auditor, and supplemental sensitivity analyses requested by the Bureau, were addressed in the auditor's supplemental report of December 23, 1992. Questions were referred to Andersen in a letter sent December 9, 1992 from Chief, Tariff Division, FCC, to Joseph P. Perrone. That letter was also sent to intervenors and is included in the docket as an attachment to Perrone's responsive letter of December 23, 1992 submitting Andersen's supplemental report. The actual analyses involve proprietary materials and were furnished to intervenors subject to nondisclosure agreements.

ONA Investigation Final Order requires BOCs using SCIS to rely on the most current version of SCIS available, or explain its use of an older version.[22]

20. The scope of SCIS disclosure ultimately accorded intervenors by Redaction II reflected the Bureau's prior, *in camera* review of the SCIS software to determine the extent to which SCIS investment study results could be manipulated by BOC staff operating the model. In addition to determining which variables could significantly alter SCIS investment study results, the *in camera* review of the unredacted SCIS software disclosed in detail the internal relationships between sensitive vendor data and the operating software, so that different approaches to redaction that would potentially compromise proprietary data could be compared. Such review was necessary for the Bureau to responsibly oversee the continued negotiations between vendors, Bellcore and the BOCs toward developing Redaction II.

21. After reviewing Ameritech's proprietary materials and determining that all such models and related, sensitive data were exempt from disclosure under FOIA, the Common Carrier Bureau in the *SCIS Disclosure Order* rejected the initial Bellcore disclosure proposal. That proposal would not have included any proprietary vendor data, even in the report submitted to the Commission under seal. The Bureau therefore developed an alternative method that identified the "major [model] elements at issue [when seeking a balanced, useful level of disclosure] -- switch vendor inputs; BOC inputs; the operational SCIS software, and documentation of its processing algorithms; and SCIS output reports." [23]

22. Redaction II thus reflected disclosure consistent with the considerations stated in the *SCIS Disclosure Order*, and gave intervenors access to the SCIS software and related materials on as broad a basis as possible without disclosing proprietary materials. The Redaction II procedures, for reasons explained in the *SCIS Disclosure Review Order*, necessarily did not enable intervenors to examine all raw input data from switch vendors, to compare the impact of different switch types on specific BSE rates, or to reconstruct the entire range of BOC assumptions at every stage of the rate development process.[24] Nevertheless, the level of review provided by intervenors, buttressed by the independent auditor's report and full staff review of the cost support materials, adequately led to full review of the proposed rates and adequate participation by the public. MCI's arguments respecting sensitivity analyses, therefore, raise no new factual or legal considerations warranting reconsideration of the orders resolving the ONA rate investigation.

23. *Adequacy of Arthur Andersen and Company's Independent Audit.* MCI challenges the characterization of the Andersen review as an "audit" by Ameritech and NYNEX. MCI states that despite the Bureau's unambiguous directive that an "independent audit" beconducted, it was eventually scaled back to an "independent review" over the protests of intervenors. MCI adds that even Andersen is unwilling to characterize its limited review as an "audit." MCI Reply (*ONA Investigation Final Order)* at 3-4.

24. The *SCIS Disclosure Order* did initially characterize the independent examination of cost models required to be undertaken by an outside auditing firm as an "independent audit."[25] The Commission's main concerns were already focused at that juncture on the internal validity and functioning of the proprietary cost models the BOCs used in developing ONA rates, as well as BOC inputs to the model and post-SCIS cost study procedures. Subsequent staff discussions with representatives of Arthur Andersen seeking to develop a detailed specification of the review clarified, however, that the contemplated study was not an "audit" as that term is used in the financial community. The letter transmitting Andersen's proposed eight-page specification of work, which refers to an "independent review" of the cost models, was submitted to the Bureau on March 5, 1992. The work specification makes the scope of Andersen's undertaking clear. By whatever term it was characterized, the focus of the Commission's concern and of the corresponding independent review remained consistent, and focused on the issues we identified as relevant to a determination of the lawfulness of ONA rates. [26]

25. *Independent Staff Review.* MCI argues that the Commission staff review of models submitted *in camera* was not comprehensive, because the *SCIS In Camera Order* [27] only required each BOC to submit software for one study area. MCI also states that, while the Commission identified four areas of review undertaken by staff,described in footnotes to paragraph 82 of the *ONA Investigation Final Order,* MCI cannot find any evidence that the staff review considered proprietary materials independently from reviewing the Andersen report. MCI Reply (*ONA Investigation Final Order)* at 4- 5.

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[22] *ONA Investigation Final Order,* 9 FCC Rcd at 449-50 (para. 21).

[23] *SCIS Disclosure Order,* 7 FCC Rcd at 1534 (para. 41).

[24] *See SCIS Disclosure Review Order,* 9 FCC Rcd at 181 (paras. 6-7), 182-83 (12-13); *ONA Investigation Final Order,* 9 FCC Rcd at 469-70 (paras 79-80). The elements of the successive redactions are itemized in a July 13, 1992 *ex parte* communication from James F. Britt, Bellcore, to the Secretary, FCC. *See also Allnet Communications Services,* FOIA Control No. 92-266, 7 FCC Rcd 6329 (1992), *upheld* Allnet Communications Services, Inc. v. FCC, 800 F. Supp. 984 (D.D.C. 1992)(*Allnet v. FCC).* While focussed on FOIA exemption issues, this order equally considers the specific risks raised by discretionary disclosure of proprietary vendor data, as noted in the *ONA Investigation Final Order,* 9 FCC Rcd at 469 (para. 78).

[25] *SCIS Disclosure Order,* 7 FCC Rcd at 1536 (para. 56), 1538 (para. 66).

[26] An informal briefing session was held at Bellcore's Washington offices May 13, 1992 at which Andersen explained the scope and substance of its review and the schedule for submission of both unredacted and redacted reports. MCI representatives attended that session, and thus were fully aware of the scope of the Andersen review. MCI also suggested specific revisions to the Andersen report methodology. *See* letter from Larry A. Blosser, MCI to James E. Farmer, Arthur Andersen, May 22, 1992. While Andersen adopted certain of MCI's suggestions in its report, such as the visual method used to identify redacted materials, other suggestions were not followed. These suggestions, such as identifying the party requesting individual redactions, or detailing the effect of vendors' pricing discounts on BSE rates, were either unnecessary or raised the concern about inadvertent disclosure of proprietary information.

[27] Commission Requirements for Cost Support Materials To Be Filed With Open Network Architecture Tariffs, 7 FCC Rcd 521 (1991) (*SCIS In Camera Order).*

26. MCI is incorrect that the *SCIS In Camera Order* required submission only of data for a single study area. That order required submission of the software for a single study area, but also required carriers to submit input and output data for all study areas, so that staff could examine BOC procedures at the study area level. The effect of inputting various, alternative data assumptions for individual study areas or altering the carrier's choice of other inputs to SCIS can be adequately examined with a single copy of the software, because the model's internal functions are not altered by the number of studies performed. Thus, the availability of multiple copies of SCIS software would not add to an understanding of the model's functioning, or the extent and effect of carriers' flexibility when using the model.

27. Moreover, the staff did undertake an independent analysis of SCIS software and its application by the BOCs. Prior to the *SCIS Disclosure Order* and consequent Andersen review, Common Carrier Bureau staff independently quantified the effects of all SCIS user inputs on SCIS outputs. These analyses were performed using the same SCIS models, containing all data and assumptions used by the BOCs in developing their ONA rates. Consequently, the results were based on information proprietary to switch vendors, *e.g.*, switch component prices, LEC-specific vendor discounts and right to use software fees. Further, outputs for each BSE were specific to a particular switch technology. These analyses also were based on actual configurations of BOC end offices. The emphasis of staff analyses was on identifying all user inputs that produced changes in outputs, and on quantifying the degree of sensitivity exhibited by individual variables. These analyses were performed for all BOCs and the results were compared. The staff review thus extended to the variables mentioned in paragraph 82 of the *ONA Investigation Final Order*,[28] and the results of that review were consistent with subsequent Andersen analyses for studies the auditor performed using the same assumptions. Based on this initial, independent staff analysis of SCIS and related BOC ratemaking procedures, the staff directed Andersen to perform a series of complex tasks, which when completed, were expected to, and did, verify the staff analyses.

28. At the outset of the ONA investigation, the Bureau explained that it would not rely exclusively on the Arthur Anderson analysis, but rather would use it as a supplement to its own review.[29] The Bureau staff analyzed the SCIS outputs in order to determine why some outputs differed for the various switch types used in ONA ratemaking. While these analyses helped the Commission to understand the sources of rate disparities between BOCs providing similar BSEs, the information contained in the reports was the type of information considered extremely sensitive by vendors. Because of the sensitive nature of the specific analyses performed by staff, release to the public was not appropriate. We have previously considered and rejected allegations that non-disclosed Bureau analysis of SCIS did not permit intervenors an adequate opportunity for review of the carriers' ratemaking methodologies.[30] MCI has not offered any new argument which provides sufficient cause to revisit this issue.

29. MCI also complains there is no indication that Commission staff reviewed two other cost models: the CCSCIS model used by Ameritech to develop costs for one BSE (Remote Activation of Message Waiting--Expanded element) and the pre-1987 version of SCIS employed by US WEST. No independent review of CCSCIS was undertaken by staff, or required of Andersen. In its discretion the Commission decided that, given its limited resources, the burden of conducting a comparable review of a single BOC's isolated use of CCSCIS to develop costs for a single BSE outweighed any potential harm from the rate level for this BSE. In light of price structure and service description variations between BOCs that made direct BSE-to-BSE rate comparisons problematic, the Commission sought to understand and quantify the several sources of the broad variations in rates between carriers, rather than to evaluate each step in an individual carrier's development of particular BSE rates in detail. This is evident both in the scope of the Andersen work specification (*March 5 Letter, supra)* and in the issues originally designated for investigation.[31] A methodological review of the CCSCIS model would not have contributed significantly to our understanding of the importance of cost models as a source of ONA rate variations.

30. As to US WEST's reliance on pre-1987 SCIS software, the *SCIS In Camera Order* did state that US WEST did not rely on SCIS, a statement based on the original support materials provided by that carrier. [32] The *ONA Investigation Final Order*, however, describes US WEST's failure to file pre-1987 SCIS software it had used, or to report accurately what software it had used to develop costs.[33] Because the US WEST case was found fundamentally flawed by its reliance on two outdated and practically irreconcilable cost models, and US WEST indicated its intention to develop subsequent rates on the basis of an updated and expanded SCM model, it was neither necessary nor desirable to require the expense and administrative burden of a separate, detailed review of the incomplete SCM software.

31. As to BellSouth's use of its non-SCIS procedure to develop a model office as a basis for calculations, MCI claims that Andersen did not fully review the methodology, but only reviewed BellSouth's explanation. The review of BellSouth's method by Commission staff and the independent auditor, and the staff's *in camera* comparison of investment results generated by the BellSouth and SCIS model

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[28] That paragraph specifically refers to the effects on SCIS outputs of model office development procedure, noncurrent SCIS models and traffic data, average or marginal SCIS studies, and embedded or prospective technology mixes. Other user inputs examined by staff include, but were not limited to, cost of money, schedules for switch replacement, and switch capacity utilized at installation and at replacement. Staff analyses of SCIS addressed not only the input variables, *e.g.*, an average versus a marginal cost study, and their effects on the costs of a unit of the automatic number identification (ANI) BSE, but more importantly whether the variables selected were consistent with the Commission's ratemaking principles. (ANI identifies the telephone number to which a telephone call should be billed. *See* Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, 7 FCC Rcd 257, 259 n.24 (Com. Car. Bur. 1991).

[29] *SCIS Disclosure Order*, 7 FCC Rcd at 1536 (para. 56).

[30] *See ONA Investigation Final Order*, 9 FCC Rcd at 467-71 (paras. 75-83); *SCIS Disclosure Review Order*, 9 FCC Rcd at 183 (para. 14).

[31] Open Network Architecture Tariffs of Bell Operating Companies, Order Designating Issues for Investigation, CC Docket No. 92-91, 7 FCC Rcd 2604 (1992).

[32] *SCIS In Camera Order*, 7 FCC Rcd at 521 n.4.

[33] *ONA Investigation Final Order*, 9 FCC Rcd at 461 n.113. c

office procedures, establish the carrier's methodology as a reasonable alternative to reliance on SCIS. The supplemental Andersen Report also includes a determination that BellSouth's exhibit, submitted *in camera* to Andersen and the Commission, demonstrates that the alternative approach generates results that differ only negligibly from those expected under SCIS.[34]

32. *FOIA Standard / Balancing Process.* MCI contends that, with regard to disclosure of SCIS materials, confidentiality interests recognized by FOIA exemptions must be balanced against the interest in enabling interested persons to participate fully in Section 204 investigations. MCI asserts that the Commission did not adequately explain its process of balancing disclosure and confidentiality interests. MCI Reply (*ONA Investigation Final Order)* at 6.

33. This balancing, however, is described at length in the *SCIS Disclosure Order.*[35] We also note that the issue of whether the Commission struck the correct balance in refusing to release the entire SCIS model and inputs pursuant to a request for disclosure submitted under the FOIA has already been decided by the courts in the Commission's favor.[36] MCI's argument only repeats contentions already completely addressed in the *SCIS Disclosure Order.*

34. *Use of Confidential Material.* Finally, MCI claims that, by not placing the entire SCIS model in the record, and by relying in part on proprietary data that were not included in the record, the Commission's actions in the ONA investigation were arbitrary and capricious.[37] MCI also cites several cases for the general proposition that Federal agencies should base their decisions on information in the record, both to facilitate judicial review and to help ensure complete debate on relevant issues.[38] MCI Reply (*ONA Investigation Final Order)* at 7-8. However, the cases on which MCI relies are distinguishable from the ONA investigation. In each instance, the agency decision failed to withstand judicial review because agency analysis used as a basis for decision had either not been presented to the public for comment or had been released after the pleading cycle was closed.[39]

VI. CONCLUSION AND ORDERING CLAUSES

35. The contentions raised by MCI raise no factual or legal considerations not previously considered in the Commission's ONA decisions. Nor are we persuaded that the various measures initially adopted by the Bureau on delegated authority, and subsequently upheld by the Commission, have unreasonably limited public participation in the ONA investigation, in light of the circumstances of that proceeding.

36. Accordingly, IT IS ORDERED, that the petitions for reconsideration of the *ONA Investigation Final Order* and the *SCIS Disclosure Review Order,* filed January 14, 1994 by MCI Telecommunications Corporation, ARE DENIED.

37. IT IS FURTHER ORDERED, that the motion to dismiss MCI's petition for reconsideration of the *SCIS Disclosure Review Order,* filed by US WEST Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[34] *See ONA Investigation Final Order,* 9 FCC Rcd at 448 (para. 17).

[35] *See SCIS Disclosure Order,* 7 FCC Rcd at 1531-33.

[36] *See Allnet v. FCC,* 800 F. Supp. at 988-90.

[37] MCI Reply (SCIS Disclosure Review) at 7-8.

[38] *Id.*

[39] *See* US Lines v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978) (no disclosure of nature of data relied upon for decision; no need to protect proprietary data); Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir. 1977) (no disclosure of *ex parte* statements to reviewing court in rulemaking proceeding; no proprietary information); American Lithotripsy Society v. Sullivan, 785 F. Supp. 1034 (D.D.C. 1992) (*American Lithotripsy)* (no presentation to public of agency analysis and research that formed basis for reimbursement rate); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied* 417 U.S. 921 (1974) (*Portland Cement)* (no opportunity to comment on tests conducted by agency). *American Lithotripsy* remanded an agency's decision because the agency had not presented any of its own analysis to the public for comment, and did not provide any opportunity for comment. Similarly, in *Portland Cement,* the court concluded that EPA's failure to release the details of emission tests until after comments were due in the rulemaking was arbitrary and capricious. *American Lithotripsy* and *Portland Cement* are both distinguishable from the ONA investigation because MCI was given an opportunity to examine the SCIS model to the extent possible without compromising proprietary data, and was able to include its analysis in its comments in the investigation.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECONNECT COMPANY
Complainant,

v. File Nos.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, E-88-83

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, E-88-84

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND, E-88-85

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, E-88-86

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, E-88-87

ILLINOIS BELL TELEPHONE COMPANY, E-88-88

INDIANA BELL TELEPHONE COMPANY, INC. E-88-89

MICHIGAN BELL TELEPHONE COMPANY, E-88-90

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY. E-88-91

NEVADA BELL TELEPHONE COMPANY. E-88-92

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, E-88-93

NEW JERSEY BELL TELEPHONE COMPANY, E-88-94

NEW YORK TELEPHONE COMPANY, E-88-95

NORTHWESTERN BELL TELEPHONE COMPANY, E-88-96

THE OHIO BELL TELEPHONE COMPANY, E-88-97

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, E-88-98

THE PACIFIC NORTHWEST BELL TELEPHONE COMPANY, E-88-99

SOUTH CENTRAL BELL TELEPHONE COMPANY, E-88-100

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, E-88-101

SOUTHWESTERN BELL TELEPHONE COMPANY, E-88-102

WISCONSIN BELL, INC., E-88-103
Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: January 26, 1995; Released: February 14, 1995

By the Commission:

I. INTRODUCTION

1. The twenty-one local exchange carriers (LECs) who are defendants here have asked for review or reconsideration[1] of the Common Carrier Bureau's determination that they improperly assessed the higher carrier common line (CCL) charge on the originating end of calls using Teleconnect's nationwide 800 travel service.[2] The Bureau found that under section 69.105[3] of the Commission's rules and the *ReadyLine Orders*[4] only a single higher CCL charge should have been assessed on the calls. According to the Bureau, the defendants had unlawfully assessed the higher CCL charge on the originating end of Teleconnect calls at the same time that the terminating LEC was also assessing the higher CCL charge. The defendants now argue that the Bureau erred in finding them liable for CCL overcharges. For the reasons discussed below, we deny the defendants' requests for review or reconsideration.

[1] Southern Bell and South Central Bell filed petitions for reconsideration. We are acting on these petitions pursuant to section 1.106(a)(1) of our rules. *See* 47 C.F.R. § 1.106(a)(1) (petitions requesting reconsideration of final actions taken pursuant to delegated authority may be referred by the designated authority to the Commission). The remaining defendants filed applications for review. Except for Nevada Bell and Pacific Bell, who filed separate applications, the remaining defendants were represented by their respective regional Bell operating companies.

[2] *See* Teleconnect Co. v. Bell Tel. Co. of Pa., 6 FCC Rcd 5202 (Com. Car. Bur. 1991) (*Bureau Order*).

[3] 47 C.F.R. § 69.105 (section 69.207 during the period covered by these complaints). Section 69.105 refers to the lower CCL charge as the "originating" charge, and the higher as the "terminating" charge, even though the "terminating" charge can, in some cases, be assessed on the originating end of a call. For purposes of greater clarity, we will use the terms "lower" and "higher."

[4] AT&T Communications Revisions to Tariff F.C.C. No. 2 (800 ReadyLine Service), 2 FCC Rcd 78 (Com. Car. Bur. 1986) (hereinafter *ReadyLine Order*), *aff'd*, 2 FCC Rcd 5939 (Com. Car. Bur. 1987) (hereinafter *ReadyLine Clarification Order*); (together *ReadyLine Orders*).

II. BACKGROUND

A. Carrier Common Line Charges and 800 Services

2. As was described in the *Bureau Order*, carrier common line charges recover the portion of a local exchange carrier's non-traffic sensitive costs of providing local switched access to interstate long distance carriers that are not recovered through subscriber line charges.[5] Originally, LECs recovered these costs at each end of a call through a charge assessed equally on both originating and terminating switched access minutes. In CC Docket No. 86-1, however, the Commission created a bifurcated CCL rate system to deter uneconomic bypass at the originating end.[6] Under this system, the CCL revenue requirement was to be recovered through a fixed rate at the terminating end and a varying but lower rate at the originating end, with the terminating rate initially fixed at $0.0433 per minute beginning on June 1, 1986.[7] The originating and terminating rates were periodically modified following implementation of the bifurcated approach. In 1987, upon the recommendation of the Federal/State Joint Board, the Commission extended this approach to CCL charges through November 30, 1988.[8] The Commission later postponed the expiration date for the bifurcated system of CCL charges until March 31, 1989.[9] Effective April 1, 1989, section 69.105 of our rules required the LECs to set their originating CCL rates at no more than one cent ($0.01) per minute and to set their terminating CCL rates to recover the remaining interstate CCL revenue requirement.[10]

3. Calls using conventional 800 services presented a particular problem for the assessment of CCL charges. Because such services normally use special access circuits on the terminating end, and thus do not use common line plant to terminate the call, no CCL charge would be assessed on this "closed" end.[11] Hence, the 800 service carrier would be assessed and pay only the lower, originating CCL charge, which at one point was set at zero. To prevent a situation in which a carrier could avoid most or all of its CCL obligation, the Commission required that calls with only one open end would be assessed the higher CCL charge on that open end.[12]

4. Another situation arose, however, with AT&T's "800 ReadyLine" service. Even though this service provided toll-free inward calling, it differed from conventional 800 services by having two open ends.[13] Because a call using ReadyLine service appeared to the originating LEC to be a conventional 800 call, the LEC would assess the higher CCL charge on the open originating end, as apparently required by section 69.105(b)(1)(iii). At the terminating end, that LEC assessed another higher CCL charge because the call was terminating on an open end. Addressing this situation in the *ReadyLine Clarification Order*, the Bureau said that it is "unlawful for LECs to assess [higher] CCL charges at both the originating and terminating ends on a single call."[14] The Bureau directed originating LECs to calculate settlements of the overcharges in cooperation with the affected interexchange carriers, using customer-provided lists of 800 calls for which billing adjustments were due.[15]

B. Teleconnect's "All-Call America" 800 Service

5. At the time the above-captioned complaints were filed, Teleconnect was an interexchange carrier based in Cedar Rapids, Iowa.[16] Teleconnect's "All-Call America" (ACA) service is a nationwide 800 travel service that uses AT&T's Megacom 800 service.[17] A call using ACA is initiated by an end user from a common line open end, is routed through a LEC to an AT&T Megacom 800 line, and is then trans-

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[5] In addition to recovering the non-traffic sensitive costs of the local exchange carriers, the CCL charges levied on Teleconnect included Long Term and Transitional Support payments, which are used to mitigate the effects of the CCL depooling that commenced on April 1, 1989. The subscriber line charge is a flat per-line charge, billed to the end user and designed to recover for the LECs a portion of the costs of LEC plant ("local loops") that are allocated to the interstate jurisdiction.

[6] WATS-Related and Other Amendments of Part 69 of the Commission's Rules, CC Docket No. 86-1 (hereinafter *WATS Access Charge Rule Making)*; Notice of Proposed Rule Making, FCC 86-1 (released Jan. 6, 1986) (*WATS NPRM)*; Report and Order, FCC 86-115, 59 RR 2d 1418 (released Mar. 21, 1986) (*WATS Access Charge Order), reconsideration denied*, FCC 86-577 (released Jan. 15, 1987) (*Reconsideration Order), further reconsideration denied*, 3 FCC Rcd 496 (1988) (*Second Reconsideration Order)*; Supplemental Notice of Proposed Rule Making, FCC 86-116 (released Mar. 25, 1986) (*Supplemental WATS NPRM)*; Second Report and Order, FCC 86-377 (released Aug. 26, 1986) (*Second WATS Access Charge Order)*.

[7] *WATS Access Charge Order*, 59 RR 2d at 1435, App. B at para. 12.

[8] MTS and WATS Market Structure, Report and Order, 2 FCC Rcd 2953, 2954-55, 2957 (1987).

[9] MTS and WATS Market Structure, Memorandum Opinion and Order on Reconsideration and Order Inviting Comments, 3 FCC Rcd 4543, 4549 (1988) (hereinafter *MTS/WATS Reconsideration Order)*.

[10] MTS and WATS Market Structure, Report and Order, 4 FCC Rcd 5048, 5051 (1988) (hereinafter *Bifurcation Order)*. Under section 69.105(b) of our rules, the originating and terminating CCL rates must be equal if the calculations otherwise specified in this section would yield a terminating rate that is less than one cent.

[11] Under section 69.105, the CCL charge is only to be assessed on an "open" end of a call, which is an end using exchange carrier common line plant to originate or terminate the call. A "closed" end does not use common line plant. A call can have one, two, or no open ends. *See* 47 C.F.R. § 69.105(a), (b)(1)(ii).

[12] Section 69.105(b)(1)(iii) of our rules, 47 C.F.R. § 69.105(b)(1)(iii), provides that "[a]ll open end minutes on calls with one open end (*e.g.*, an 800 or [foreign exchange service] call) shall be treated as terminating minutes."

[13] ReadyLine service used its "customers' existing switched access local exchange lines at the terminating end rather than the dedicated access lines used to terminate AT&T's regular 800 service," thereby providing a way for customers to obtain 800 service without incurring the cost of installing dedicated lines. *See ReadyLine Order*, 2 FCC Rcd at 78.

[14] *ReadyLine Clarification Order*, 2 FCC Rcd at 5943.

[15] *Id.* at 5942-43.

[16] Teleconnect is now a wholly owned subsidiary of MCI Telecommunications Corporation. *See* Teleconnect Motion for Extension of Time and Consolidation at 4 n.12 (filed October 16, 1991).

[17] Megacom 800 is a distance- and usage-sensitive, inward dialing service offered under tariff by AT&T with full dedicated access on the closed ends. Customers of this service are able to define, by specific Numbering Plan Area (NPA), the geographic areas from which they are willing to receive calls. AT&T Communications Tariff F.C.C. Nos. 1, 9, and 10, 5 FCC Rcd 298, 299 (1990).

ferred from AT&T to Teleconnect by another LEC.[18] At that point, Teleconnect generally routes the call through the LEC to the end user being called. If that end user is outside the local exchange area, however, Teleconnect sends the call over a private line to the end user's local exchange area and then through a LEC to the end user. In both cases, the call will originate and terminate on an open end.

C. The Complaints and the Bureau Order

6. According to Teleconnect, both the originating and the terminating LECs assessed the higher CCL charge on ACA calls. After unsuccessfully asking for refunds from the terminating LECs who are defendants here, Teleconnect filed the above-captioned complaints. Teleconnect's complaints alleged that its ACA service is "very similar" to ReadyLine service because both 800 services have two open ends. It claimed that the defendants had violated the *ReadyLine Orders* by assessing a second higher CCL charge on the terminating end of each ACA call. Teleconnect requested that we order the defendants to cease assessing the higher CCL charge on the terminating end and to refund to Teleconnect the difference between the higher CCL charges that were actually assessed on that end and the lower CCL charges that should have been assessed, plus interest.[19] Unlike the remedy in *ReadyLine*, which took the formP of credits from originating LECs, Teleconnect asked us to require a refund and a prospective reduction in the terminating LEC charges because it is allegedly impossible to identify the originating LEC that imposed a higher CCL charge, given the lack of signalling information from the originating LEC.[20]

7. Most defendants responded that they do in fact assess higher CCL charges on the terminating end of Teleconnect's ACA calls but that our rules require this. The defendants denied levying any unlawful charges and claim that refunds are not warranted. Most defendants also denied that Teleconnect's ACA service is at all similar to AT&T's 800 ReadyLine service.

8. In its decision, the Bureau granted Teleconnect's complaints. First, the Bureau determined that an ACA call is a single, end-to-end call, not two calls as claimed by some defendants.[21] Next, the Bureau found that ACA and ReadyLine services, while not identical, share "such significant characteristics as two open ends and the use of an 800 line for the first leg of the call."[22] In light of that finding, the Bureau decided that the holdings of the *ReadyLine Orders* apply in these proceedings. Applying the *ReadyLine* holding that it is unlawful to assess the higher CCL charge at both the originating and terminating ends of a single call, the Bureau directed the parties to negotiate the amounts to be refunded to Teleconnect for CCL overcharges at the originating end of ACA calls.[23] Though Teleconnect had sought refunds from the defendantsas terminating carriers, the Bureau noted that credit for the second higher CCL charge in *ReadyLine* had come on the originating end. The Bureau said that in the instant proceedings, the "identifiable terminating carriers are likely also to be originating carriers. Therefore, these defendants have a duty to devise a credit mechanism" for refunds at the originating end.[24] All of the defendants have requested review or reconsideration of the Bureau's decision.

III. DISCUSSION

A. Whether Teleconnect's ACA Service is a Single Call and is Otherwise Similar to AT&T's ReadyLine Service

9. *Contentions of the parties.* Several of the defendants challenge the Bureau's finding that the Teleconnect ACA call is a single call despite the Teleconnect network configuration. They also challenge the conclusion that ACA is sufficiently similar to ReadyLine calls to warrant the application of the holdings in the *ReadyLine Orders*.[25] Nevada Bell, Pacific Bell, US West,[26] and Southwestern Bell each argue that the Bureau improperly ignored important differ-

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[18] Teleconnect notes that although it uses LEC facilities at this point "to access AT&T's Megacom 800 service, Teleconnect uses such facilities only because it chooses not to bypass the LEC in this instance. AT&T's Megacom 800 tariff allows direct connection to users of that service." Complaint at Exhibit A. Teleconnect thus characterizes this LEC involvement as "optional."

[19] Teleconnect seeks the following amounts, plus interest, from each defendant: Bell Telephone Company (Bell) of Pennsylvania - $10,794.98; Chesapeake and Potomac Telephone Company (C&P)-$7,519.63; C&P of Maryland - $3,666.66; C&P of Virginia - $3,897.08; C&P of West Virginia - $509.56; Illinois Bell - $444,957.53; Indiana Bell - $14,913.09; Michigan Bell - $13,575.47; Nevada Bell - $1,604.10; New Jersey Bell - $6,914.79; New York Telephone Company - $12,750.21; Northwestern Bell - $560,374.66; Ohio Bell - $17,628.89; Mountain States Telephone and Telegraph Company (Tel. & Tel.) - $29,382.14; New England Tel. & Tel. - $13,319.43; Pacific Tel. & Tel. - $33,809.91; Pacific Northwest Bell - $7,053.74; South Central Bell - $16,559.67; Southern Bell Tel. & Tel. - $35,991.34; Southwestern Bell - $133,479.83; Wisconsin Bell - $64,454.14.

[20] *See Bureau Order*, 6 FCC Rcd at 5207.

[21] *Id.* at 5206.

[22] *Id.* at 5207.

[23] *Id.* at 5207-08. The Bureau also directed the parties to report to its Enforcement Division on the status of settlement discussions. On December 5, 1991, MCI, on behalf of Teleconnect, reported that the parties had discontinued their negotiations in all of the proceedings except Teleconnect v. Southwestern Bell Telephone Co., File No. E-88-102. *See* Letter of Steve Hoffer, MCI, to Mary Beth Richards, Chief, Enforcement Division, Common Carrier Bureau, FCC (dated December 5, 1991). Because the parties to the latter case have not informed the Commission staff to the contrary, we assume that negotiations in that case have also been unsuccessful. We note that Southwestern Bell has filed an application for review of the *Bureau Order*.

[24] *Bureau Order*, 6 FCC Rcd at 5207.

[25] The remaining defendants, who are not mentioned in this paragraph, did not take issue with the Bureau's finding that the ACA configuration is a single call.

[26] At the time the complaint was filed, US West owned, as separate entities, the defendants Mountain States Telephone and Telegraph, Northwestern Bell, and Pacific Northwest Bell. Effective January 1, 1991, Northwestern Bell and Pacific Northwest Bell merged into Mountain States. On January 2, 1991, Mountain States' name was changed to US West Communications, Inc. *See* Mountain States Telephone & Telegraph Co., 5 FCC Rcd 1982 (Com. Car. Bur. 1990).

ences between the two services.[27] They maintain that Teleconnect's ACA service configuration is, unlike ReadyLine service, actually comprised of two calls and that two higher CCL charges are therefore justified. According to these defendants, the first call originates with the calling party and terminates at Teleconnect's intermediate switch. Under the defendants' analysis, the calling party then initiates a second call, which originates at the Teleconnect switch and terminates at the called party's line. Nevada Bell and Pacific Bell add that the Bureau invalidly based its conclusion that the ACA configuration is one call on cases that deal with "jurisdictional" rather than "billing" issues. Southwestern Bell claims that the underlying Megacom 800 portion of ACA service is distinct from the remainder of the ACA configuration because Megacom, which "terminate[s] on a dedicated line," is purchased under a separate contract with AT&T. NYNEX[28] also argues that ACA service is unlike ReadyLine service. It contends, however, that while ReadyLine service possesses two ends, both of which are open, "ACA service possesses at least three ends": an originating open end, a closed end at Teleconnect's switch, and another open end at the terminating point.[29] NYNEX asserts that the originating LEC should be compensated with the higher CCL charge "for the use of the facilities used to originate the 800 call and to terminate the call at Teleconnect's switch," and that the terminating LEC should also be compensated with the higher CCL charge for the use of its facilities at that end.[30]

10. In its opposition to the applications for review,[31] Teleconnect responds that the Bureau properly dismissed the defendants' arguments regarding the similarity of ACA service to ReadyLine service.[32] It contends that the Bureau correctly identified such significant similarities between the ACA and ReadyLine services as the two open ends and the use of an 800 line for the first leg of a call using either service.[33] Teleconnect further maintains that the Bureau validly applied the established legal standard that an "[i]nterstate wire communication ... does not end at an intermediate switch."[34] It points out that the "intermediate switching function performed by AT&T's Megacom 800 service is transparent to an ACA caller," as is the case with AT&T's intermediate switching of its ReadyLine service.[35]

11. In their replies, Nevada Bell and Pacific Bell state that Teleconnect does not dispute their claim that a second number must be dialed when an ACA call reaches Teleconnect's intermediate switch.[36] They argue that the need for this second number shows that the ACA configuration is actually two calls. Although Ameritech[37] states that "it does not matter whether ACA Service involved one call or two"[38] and that this issue is "irrelevant to the issue of liability,"[39] it notes in its reply that it disagrees with the Bureau's conclusion that the ACA configuration is a single call. Ameritech contends that the ACA configuration should be treated as two calls and distinguishable from ReadyLine because LEC facilities are used to transfer the caller to Teleconnect's intermediate switch.[40] In its reply, Southwestern Bell reiterates that the Megacom portion of the ACA configuration is contractually separate from the remainder of the service because the first portion is governed by a contract between AT&T and Teleconnect, while the second portion is governed by a contract between Teleconnect and its customer.[41] According to Southwestern Bell, "[b]ecause two separate contracts were involved, and two separate services, both originating and terminating LECs were justified in charging the higher CCL rate, if such rate was in fact charged."[42]

12. *Decision.* We agree with the Bureau that a caller using the Teleconnect ACA service is making a single call.[43] As the Bureau correctly noted, both court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications.[44] According to these precedents, we regulate an interstate wire communication under the Communications Act from its inception to its completion. Such an interstate communication does not end at an intermediate switch. As the Bureau correctly noted, this view of our jurisdiction under the Act gives rise to an assumption that the interstate communication itself extends from the inception of a call to its completion, regardless of any intermediate facilities.[45] Applying this principle to the case before us, we conclude that a call placed using the ACA configuration is a single interstate communication. While Nevada Bell and Pacific Bell attempt to distinguish the so-called "jurisdictional" nature of a call from its status for "billing" purposes, they present no

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[27] Nevada Bell Application at 3-5; Pacific Bell Application at 2-4; US West Application at 6-11; Southwestern Bell Application at 7-9. In addition, Nevada Bell argues that it could have no liability to Teleconnect in any event because Teleconnect was never its customer. Nevada Bell Application at 2-3. The record shows, however, that Teleconnect did identify its billing account number to Nevada Bell, despite the latter's denial that a customer-carrier relationship existed. Complaint at Exhibit C (Teleconnect letter to Nevada Bell, dated Feb. 22, 1988, specifying its account number), Exhibit D (Nevada Bell letter to Teleconnect, dated March 21, 1988, requesting account number that had apparently been disclosed already). We find that Teleconnect adequately established that it was Nevada Bell's customer by disclosing its billing account number and that Nevada Bell failed to challenge the validity of that account number or otherwise refute the reasonable inference that a customer-carrier relationship existed.

[28] NYNEX owns the defendants New England Telephone and Telegraph Company and New York Telephone Company.

[29] NYNEX Application at 5.

[30] *Id.*

[31] Teleconnect also filed a separate opposition to the BellSouth defendants' petition for reconsideration. In it, however, Teleconnect incorporates by reference its opposition to the applications for review and states that the latter opposition also responds in detail to arguments in the BellSouth petition. We will therefore refer herein only to Teleconnect's opposition to the applications for review.

[32] Teleconnect Opposition at 5.

[33] *Id.* at 6.

[34] *Id.* (citing *Bureau Order*, 6 FCC Rcd at 5206).

[35] *Id.*

[36] Nevada Bell Reply at 2-3; Pacific Bell Reply at 1-2.

[37] Ameritech wholly owns defendants Illinois Bell, Indiana Bell, Michigan Bell, Ohio Bell, and Wisconsin Bell.

[38] Ameritech Application at 8.

[39] Ameritech Reply at 2.

[40] *Id.* at 2-3.

[41] Southwestern Bell Reply at 4.

[42] *Id.*

[43] *See Bureau Order*, 6 FCC Rcd at 5206.

[44] *See* National Ass'n of Regulatory Utility Comm'rs v. FCC, 746 F.2d 1492, 1498 (D.C. Cir. 1984) ; United States v. AT&T, 57 F. Supp. 451, 454 (S.D.N.Y. 1944); New York Telephone Co., 76 FCC 2d 349, 352 (1980).

[45] *Bureau Order*, 6 FCC Rcd at 5206.

persuasive argument nor any authority to support their contention that this distinction has legal significance. Similarly, Southwestern Bell's assertion that a significant contractual distinction can be drawn between the portions of ACA service is unavailing. Southwestern Bell does not explain why a separate CCL obligation should attach to the Megacom portion of the ACA service simply because it is furnished under a contract between Teleconnect and AT&T. Further, contrary to the implication of Southwestern Bell's description, Teleconnect provides the entire ACA configuration to its customer, including the resold Megacom portion, not just the second portion.

13. NYNEX claims that ACA service has three ends, with a third end at Teleconnect's intermediate switch, and that Teleconnect owes higher CCL charges to the originating LEC "for the use of the facilities to originate the 800 call and to terminate the call at Teleconnect's switch," and to the terminating LEC "for the additional use of LEC facilities in terminating the call."[46] Even if we were to find that a third, intermediate end did exist in the ACA configuration, we disagree that the existence of that end would alter Teleconnect's CCL obligations to the originating and terminating LECs. NYNEX rests its argument on the premise that the originating LEC is also providing facilities at the supposed, intermediate end. Because the ACA configuration described in the record does not show that the same LEC would be handling the call at these two points, we reject the NYNEX premise and the argument based on it.[47]

14. In general, all of the defendants' arguments ignore the fact that ACA service conveys a single communication from the caller to the called party. Indeed, from the caller's point of view, any intermediate switching during the call is, as Teleconnect claims, "transparent." The record reflects that the user of ACA service intends to make a single call terminating not at the Teleconnect intermediate switch, where the Megacom link ends, but at the telephone line of the called party. Thus, from the caller's perspective, ACA service is identical to ReadyLine, regardless of whether that caller must dial a second number at some point before the call is completed.[48]

15. As the Bureau noted, ACA service is not identical in every respect to ReadyLine service. Nonetheless, we agree with its finding that the two services share significant characteristics, such as two open ends and the use of an 800 line for the first portion of the call. Because any differences between the services are immaterial to the matter before us, the Bureau properly concluded that the ACA configuration is "virtually identical" to the ReadyLine configuration and that the *ReadyLine Orders* provide the relevant analysis of the matters at issue.[49]

B. Whether Two Higher CCL Charges Were Assessed

16. *Contentions of the parties.* Ameritech and Southwestern Bell each argue that the Bureau improperly assumed, without proof, that the originating LECs assessed a higher CCL charge on AT&T's Megacom service and that AT&T passed this charge on to Teleconnect.[50] Because only AT&T had a direct relationship with the originating LEC, these defendants contend that AT&T is an essential party to these proceedings. In its opposition, Teleconnect responds that the "defendants acknowledge they charged AT&T the higher [CCL] rate at the originating end."[51] Teleconnect also claims that it is "undeniable that AT&T's Megacom 800 service rates to Teleconnect recover the [higher] access charges it incurs at the originating end of ACA calls" and that AT&T's participation is therefore unnecessary.[52] In its reply, Southwestern Bell states that it "has pointed out that the originating LECs charged the higher [CCL] rate to AT&T, not Teleconnect."[53] BellSouth replies that Teleconnect pays only interexchange, not CCL, charges on the originating end and that AT&T's interexchange charges do not necessarily include the full CCL charges that AT&T pays.[54]

17. *Decision.* As Southwestern Bell, US West, Nevada Bell, Pacific Bell, and BellSouth appear to acknowledge,[55] the originating LECs did, in fact, assess the higher CCL charge on the originating end of the AT&T Megacom portion of an ACA call. Indeed, the configuration of Megacom service induced that assessment. Viewed independently of the remainder of the ACA configuration,[56] the Megacom portion originates on an open end and terminates on a closed end.[57] Because the originating LEC would know only that the call is using an 800 service, it would assume that the call has only one open end, as is the case with most 800 calls, and that the higher CCL charge is therefore appropriate on the originating end.[58] Consequent-

[46] NYNEX Application at 4-5 (citing MTS and WATS Market Structure, Mimeo No. 1498, para. 24, 28 (released December 18, 1985) (Commission found that a certain call configuration could be described as having three ends)).

[47] We also note that any intermediate LEC involvement in the delivery of an ACA call to Teleconnect's switch is optional because Teleconnect could choose to bypass that LEC. *See* Complaint at Exhibit A.

[48] From the ACA caller's perspective, the dialing of an 800 number followed by a second number would be similar to a caller using a carrier's 800 access code to gain access to the carrier's network and then specifying the called party's line number. The similarity between such a service configuration and ACA service is not at issue here, but we note that to a caller, each would appear to be a single call.

[49] *Bureau Order*, 6 FCC Rcd at 5207.

[50] Ameritech Application at 17; Southwestern Bell Application at 4-7. Nevada Bell and Pacific Bell, while acknowledging that the higher CCL charge is assessed on the originating end, state that "[w]hether or not AT&T passes this charge along to[]Teleconnect is unclear." Nevada Bell Application at 5-6; Pacific Bell Application at 4-5.

[51] Teleconnect Opposition at 8.

[52] *Id.* at 9 (citing Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 2893-99, 3005-06, 3065-67 (1989)).

[53] Southwestern Bell Reply at 2 (citing Southwestern Bell Application at 9). Despite the unequivocal language in this reply, Southwestern Bell's application actually makes this statement conditionally. *See* Southwestern Bell Application at 9 (originating LECs would have been justified in assessing higher CCL charge "if, in fact, the higher charges were made").

[54] BellSouth Reply at 4-5.

[55] Southwestern Bell Reply at 2; US West Application at 9 (when the caller dials the Megacom 800 number, "the LEC central office originating the call sees the 800 dialed digits and bills AT&T the [higher] CCL charge"); Nevada Bell Application at 5-6; Pacific Bell Application at 4-5; BellSouth Reply at 4-5.

[56] This analysis does not imply that the two portions of the ACA configuration are separable for purposes of CCL assessment.

[57] *See Bureau Order*, 6 FCC Rcd at 5204 n.20; US West Application at 9.

[58] *See* 47 C.F.R. § 69.105(b)(1)(iii) ("All open end minutes on calls with one open end (*e.g.*, an 800 or FX call) shall be treated as terminating minutes.").

ly, we conclude that the Bureau correctly found that the originating LECs did assess the higher CCL charge. The defendants offer no evidence demonstrating that AT&T did not pass on the CCL charge to its customer, Teleconnect.[59] Because we find that the higher CCL charge was assessed on AT&T's Megacom service and that AT&T included that charge in its Megacom rates, the participation of AT&T is not essential to these proceedings.

C. Liability for the CCL Overcharges

18. *Contentions of the parties.* All of the defendants argue in some manner that the Bureau improperly imposed liability on them, regardless of whether the ACA configuration is one call or two. Nevada Bell, Pacific Bell, BellSouth, Bell Atlantic, NYNEX, and Ameritech each claim that the Bureau erred because, as terminating LECs, they imposed the higher CCL charge on the terminating end in accordance with the requirements of section 69.105 of our rules and should not have been held liable if overcharges existed on the originating end.[60] Several of the defendants also argue that the Bureau's finding of liability exceeded its delegated authority by effecting an improper, retroactive change in the Commission's rules. US West asserts that regardless of the ACA configuration, no refund is owed to Teleconnect.[61] It and Southwestern Bell maintain that Teleconnect had no customer-carrier relationship with the originating LECs and could only look to AT&T for a refund based on CCL overcharges on the originating end.[62] Conversely, BellSouth claims that only AT&T, as the actual originating access customer, could request a refund for CCL overcharges.[63]

19. BellSouth, Bell Atlantic, NYNEX, Ameritech, and Southwestern Bell also contend that the Bureau found, without support from the record, that Teleconnect could not identify the actual originating LECs and that the defendants were likely to have been originating as well as terminating carriers.[64] Certain defendants argue that Teleconnect could have determined the actual originating LECs by using the regional restrictions that it specified for Megacom[65] or by using the information on which it based its bills to its customers.[66] Ameritech asserts that the inadequacy of the record on such points necessitated referral of these proceedings to an administrative law judge.[67] Southwestern Bell notes that the Bureau granted relief that Teleconnect did not seek by finding the originating LECs liable.[68]

20. In its opposition, Teleconnect maintains that a prior Commission ruling requires LECs to provide credits to interexchange carriers so as to avoid imposing the higher CCL charge on both ends of a ReadyLine-type service.[69] It contends that the defendants arearguing that "it was permissible for them to have imposed [higher] CCL charges on one end of ACA calls, irrespective of whether [higher] CCL charges were imposed on the other end of these calls."[70] Teleconnect states that it is entitled to CCL credits to the same extent as AT&T was for its ReadyLine service. Teleconnect further asserts that the Bureau's decision was not a retroactive rule change because the Bureau was simply applying relevant precedent.[71] In their replies, the defendants generally reiterate their original arguments.

21. *Decision.* Aside from their "two-call" argument, which we have discussed above, the defendants do not appear to challenge the Bureau's conclusion that a single call with two open ends should not be assessed two higher CCL charges.[72] Indeed, when the Commission adopted the provisions governing CCL charges, it did not state or even imply that any call configuration would require or permit the assessment of two higher CCL charges.[73] As we have already found, the originating LECs did assess the higher CCL charge on the originating end of ACA calls, and most of the defendants have acknowledged that they assessed the higher charge on the terminating end.[74] Therefore, given that Teleconnect was unlawfully assessed a second higher CCL charge, we must now determine how to apportion liability for the overcharges.

22. The Bureau found that Teleconnect may not be able to identify the originating LECs in order to request CCL credits because the signalling information that Teleconnect receives generally does not include the identity of the calling number or, therefore, of the originating LEC.[75] Nonetheless, the Bureau determined that the defendants were likely to have been originating carriers for ACA calls

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[59] The Commission has previously recognized that carrier common line charges are included in the rates for the services that an underlying carrier provides to resellers. *See WATS Access Charge Order*, 59 RR 2d at 1432 (resellers should not have to make double contribution toward recovery of common line costs); *WATS NPRM*, FCC 86-1, para. 12 & n.29 (reseller makes CCL contribution indirectly through rates for the services it resells).

[60] Nevada Bell Application at 5-7 (denies that Teleconnect was its customer but states that the higher charge was proper on terminating end); Pacific Bell Application at 4-6; BellSouth Petition at 3-6, 7-8 (also acted consistently with *ReadyLine* on terminating end; any potential liability would be to originating access customer, AT&T); Bell Atlantic Application at 2-4; US West Application at 3; NYNEX Application at 5-6; Ameritech Application at 6, 11-12.

[61] US West Application at 11-13.

[62] *Id.*; Southwestern Bell Application at 6-7; *accord* BellSouth Reply at 9-10 (Teleconnect should seek redress from AT&T for originating end overcharges).

[63] BellSouth Petition at 6-7.

[64] BellSouth Petition at 8-9; Bell Atlantic Application at 3-4; NYNEX Application at 6; Ameritech Application at 14; Southwestern Bell Application at 5.

[65] Southwestern Bell Application at 3-4. Customers of Megacom service such as Teleconnect are able to define, by specific Numbering Plan Area (NPA), the geographic areas from which they are willing to receive calls. AT&T Communications Tariff F.C.C. Nos. 1, 9, and 10, 5 FCC Rcd 298, 299 (1990).

[66] Bell Atlantic Application at 3 n.8; Ameritech Application at 14.

[67] Ameritech Application at 15-16.

[68] Southwestern Bell Application at 2.

[69] Teleconnect Opposition at 9 (citing *Bifurcation Order*, 4 FCC Rcd at 5053).

[70] *Id.*

[71] *Id.* at 13 (citing *Bifurcation Order* and *ReadyLine Orders*).

[72] *Bureau Order*, 6 FCC Rcd at 5207.

[73] *See Bifurcation Order*, 4 FCC Rcd at 5051-53; 47 C.F.R. § 69.105; *see also WATS Access Charge Order*, 59 RR 2d at 1432, 1444 (only one higher CCL charge specified for single calls), *cited in ReadyLine Clarification Order*, 2 FCC Rcd at 5942.

[74] Pacific Bell Application at 5; BellSouth Petition at 6; Bell Atlantic Application at 3; US West Application at 3; NYNEX Application at 5; Ameritech Application at 6.

[75] *Bureau Order*, 6 FCC Rcd at 5207.

and that they have an obligation to devise a credit mechanism, based on a surrogate, for the overcharges. The defendants now challenge this determination, claiming that they acted only as terminating carriers who lawfully assessed the higher CCL charge. They suggest that any liability should be borne by the originating LECs who actually provided originating access, or by AT&T, who passed on the originating charge to Teleconnect. Another theory is that only AT&T, who actually paid the originating CCL charges, can claim credits.

23. We affirm the Bureau's approach. First, we must clarify that the Bureau did not place liability for the overcharges on the defendants in their role as terminating carriers.[76] Instead, the Bureau found that the defendants were liable to the extent that they had acted as originating carriers. We agree with the Bureau that it is likely that the defendants, with territories covering most of the United States, acted as originating carriers for ACA calls. The Bureau's approach, which adjusts the originating CCL charges to the lower rate, follows the remedy ordered in *ReadyLine*. The result of the Bureau's approach is that Teleconnect would pay the lower CCL rate on the originating end and the higher rate on the terminating end. This scheme is explicitly contemplated by section 69.105 of our rules for certain types of calls. As such, the Bureau did not effect a retroactive change in the rules.

24. Unlike the situation in *ReadyLine*, however, the actual originating LECs for specific calls are not identifiable here. Despite the defendants' arguments, we have no reason under this record to question Teleconnect's claim that it cannot identify the originating LECs by referring to the regional restrictions of its Megacom service or by using billing information. The regional Megacom restrictions would not indicate how much calling traffic actually originated with a particular LEC; instead, this information would only show whether any calls could have originated with certain LECs.[77] Similarly, Teleconnect's billing information would not indicate the originating LECs for specific calls because Teleconnect does not receive such signalling information when the call reaches its switch.[78] In fact, Teleconnect would not need such information when billing its customer, the called party. It could simply include the total charge for AT&T's Megacom service in its own rates for ACA service. Hence, the record does not suggest any practical method by which Teleconnect could identify the actual originating LECs for specific calls.

25. Without specific identification of the originating LECs, however, the parties will have to develop a surrogate to apportion liability. We agree with the Bureau that surrogates can be an acceptable method by which to apportion damages.[79] For example, a reasonable surrogate might be developed by using LEC data that would indicate the ratio between a defendant's 800 revenues or minutes and the total nationwide figure, or a ratio between the number of lines in a defendant's territory and the total number of lines in the U.S. This surrogate could be used to calculate the approximate amount of originating ACA traffic that each defendant handled, thus allowing a reasonable measure of the damages for which each defendant is responsible. Because the information needed to develop a surrogate is not in the record of these proceedings but, instead, appears to be in the possession of the parties, we direct them to work cooperatively and engage in good faith negotiations to achieve a settlement on the issue of the amounts to be refunded or credited by each defendant. We further direct the parties to report in writing to the Bureau's Enforcement Division, within ninety (90) days of the release of this decision, on whether a settlement has been reached or any progress has been made in this regard. If no agreement is reached within this ninety-day period, the Enforcement Division staff shall establish a further proceeding to apportion damages.

26. The defendants' contentions regarding the issue of liability are without merit. They have suggested that AT&T should bear liability to Teleconnect for the CCL overcharges or that only AT&T, not Teleconnect, can claim credit for these overcharges on the originating end. We disagree with these analyses. AT&T, which is not a party here, should not bear liability to Teleconnect because it did not act unlawfully in merely passing through the higher CCL charges that it paid on the originating end of the ACA configuration. Moreover, AT&T alone would not have grounds to request credits for these charges because the Megacom portion of the configuration, viewed independently of the remainder of the single ACA call, had an open originating end and a closed terminating end. Hence, a higher CCL charge on the originating end of the Megacom portion alone would be proper. Because AT&T itself could not request credit for the originating CCL charges, it should not be held liable to Teleconnect.

27. In addition, Ameritech has asserted that referral to an administrative law judge (ALJ) is necessary.[80] We disagree and conclude that the record herein is adequate to resolve the issues raised by the parties. With the exception of information that would allow the identification of the originating LECs for specific ACA calls, all other necessary facts are present in this record, and the issues were fully argued by the parties. In addition, we conclude that the Bureau properly denied the defendants' motions to dismiss, in view of the merits of Teleconnect's claims.[81] We also note that Southwestern Bell inaccurately contends that the Bureau failed to rule on Teleconnect's motions to compel. The Bureau addressed the motions in paragraphs 16 and 17 of its order.[82]

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[76] We note that at this stage of the proceedings, Teleconnect is no longer arguing that the defendants should be held liable as terminating carriers for the overcharges. Instead, Teleconnect cites the *ReadyLine* orders and maintains that the defendants should be held liable as originating carriers, as the Bureau concluded. *See* Teleconnect Opposition at 7-12.

[77] To the extent that Teleconnect's regional Megacom restrictions, which are not specified in the record, indicate that certain defendants could not have originated ACA calls, those defendants shall not be liable for the CCL overcharges at issue.

[78] *Bureau Order*, 6 FCC Rcd at 5207.

[79] *See id.* at 5207 & nn.67, 69.

[80] *See* Ameritech Application at 15-16.

[81] *See id.* at 5-6 (claims that Bureau improperly denied motions).

[82] *Bureau Order*, 6 FCC Rcd at 5206-07.

IV. CONCLUSION

28. For the reasons discussed above, we deny the defendants' requests for review or reconsideration of the Common Carrier Bureau's decision in the above-captioned proceedings. We conclude that the defendants, in their roles as originating local exchange carriers, unlawfully assessed the higher carrier common line charge on the originating end of Teleconnect's All-Call America 800 service.[83] The unlawful overcharge was an amount equal to the difference between the charges actually assessed, which were calculated at the higher CCL rate, and the proper charges, which should have been calculated at the lower CCL rate. Because the parties appear to possess the information that is needed to determine how damages shall be apportioned, the parties shall engage in settlement negotiations as described in this Order and shall report to the Common Carrier Bureau's Enforcement Division within ninety (90) days of the release of this decision. If the parties do not reach agreement on the apportionment of damages by that date, the Enforcement Division staff shall establish a further proceeding to address this issue.

V. ORDERING CLAUSES

29. ACCORDINGLY, IT IS ORDERED, pursuant to sections 4(i), 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 208, 209, that the petition for reconsideration filed by the BellSouth defendants and the applications for review filed by the remaining above-captioned defendants ARE DENIED to the extent described herein.

30. IT IS FURTHER ORDERED that the parties shall engage in settlement negotiations as described in this Order and shall report to the Common Carrier Bureau's Enforcement Division within ninety (90) days after the release of this Order.

31. IT IS FURTHER ORDERED that the requests for stay filed by Bell Atlantic, Ameritech, US West, NYNEX, Pacific Bell, and Nevada Bell ARE DISMISSED.

32. IT IS FURTHER ORDERED that the pleadings filed by Long Distance/USA, *et al.*, ARE DISMISSED.

33. IT IS FURTHER ORDERED that the motion for late acceptance of Teleconnect's opposition to the applications for review IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[83] Given our action herein, we dismiss as moot the requests for stay filed by Bell Atlantic, Ameritech, US West, NYNEX, Pacific Bell, and Nevada Bell. We also dismiss, as unauthorized by our rules, pleadings filed by the non-parties Long Distance/USA, *et al.* We grant Teleconnect's unopposed motion for late acceptance of its opposition to the applications for review.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONG DISTANCE/USA, INC.,
AMERICAN SHARECOM, INC.,
MID-AMERICAN LONG DISTANCE COMPANY,
TELEMARKETING INVESTMENTS, LTD.,
NATIONAL TELECOM OF AUSTIN, and
TOTAL-TEL, USA,
Complainants,

v.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-89-03
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	File No. E-89-04
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-89-05
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-89-06
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-89-07
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-08
DIAMOND STATE TELEPHONE COMPANY,	File No. E-89-27
ILLINOIS BELL TELEPHONE COMPANY,	File No. E-89-09
INDIANA BELL TELEPHONE COMPANY,	File No. E-89-10
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-11
THE OHIO BELL TELEPHONE COMPANY,	File No. E-89-12
WISCONSIN BELL, INC.,	File No. E-89-13
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-14
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-15
THE PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-16
THE BELL TELEPHONE COMPANY OF NEVADA,	File No. E-89-17
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-18
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-89-19
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-20
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-21
NEW YORK TELEPHONE COMPANY,	File No. E-89-22
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-23
CENTEL CORPORATION,	File No. E-89-24
CINCINNATI BELL, INC.,	File No. E-89-25
CONTEL CORPORATION,	File No. E-89-26
GTE CORPORATION,	File No. E-89-28
HAWAIIAN TELEPHONE COMPANY,	File No. E-89-29
NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.,	File No. E-89-30
SOUTHERN NEW ENGLAND TELEPHONE COMPANY, and	File No. E-89-31
UNITED TELECOMMUNICATIONS, INC.,	File No. E-89-32

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: January 26, 1995; Released: February 14, 1995

By the Commission:

I. INTRODUCTION

1. The defendants listed above have asked for review of the Common Carrier Bureau's determination that they improperly assessed the higher of two carrier common line (CCL) charges on the originating end of calls using the complainants' interstate 800 services.[1] The Bureau found that under section 69.105 of the Commission's rules[2] and the *ReadyLine Orders*[3] the higher CCL charge should have been assessed only once on each call. According to the

[1] *See* Long Distance/USA v. Bell Tel. Co. of Pa., 7 FCC Rcd 408 (Com. Car. Bur. 1992) (hereinafter *Bureau Order*).

[2] 47 C.F.R. § 69.105 (section 69.207 during the period covered by these complaints). Section 69.105 describes to the lower CCL charge as the "originating" charge, and the higher as the "terminating" charge, even though the "terminating" charge can, in some cases, be assessed on the originating end of a call. For purposes of greater clarity, we will use the terms "lower" and "higher."

[3] AT&T Communications Revisions to Tariff F.C.C. No. 2 (800 ReadyLine Service), 2 FCC Rcd 78 (Com. Car. Bur. 1986) (hereinafter *ReadyLine Order*), *aff'd*, 2 FCC Rcd 5939 (Com. Car. Bur. 1987) (hereinafter *ReadyLine Clarification Order*); (together *ReadyLine Orders*).

Bureau, the defendants[4] had unlawfully assessed the higher CCL charge on the originating end of the complainants' calls at the same time that the terminating LEC was also assessing the higher CCL charge. The defendants now argue that the Bureau erred in finding them liable for CCL overcharges. For the reasons discussed below, we deny the defendants' applications for review.

II. BACKGROUND

A. Carrier Common Line Charges and 800 Services

2. Carrier common line charges recover the portion of a local exchange carrier's non-traffic sensitive costs of providing local switched access to interstate long distance carriers that is not recovered through subscriber line charges.[5] Originally, LECs recovered these costs through a uniform per-minute CCL charge assessed at each end of a call. In the CC Docket No. 86-1 proceeding, however, the Commission changed the CCL rate structureto deter uneconomic bypass at the originating end.[6] Under the revised system, the CCL revenue requirement was to be recovered through a fixed rate at the terminating end and a varying but lower rate at the originating end of a call.[7] The originating and terminating rates have since been periodically adjusted.[8]

3. Calls using conventional 800 services presented a particular problem under the revised CCL rate structure. Because 800 services normally use special access on the terminating end, no CCL charge would be assessed on this "closed" end.[9] To prevent a situation in which a carrier would pay only the lower, originating CCL charge, the Commission required that calls with only one open end would be assessed the higher CCL charge on that open end.[10]

4. AT&T's "800 ReadyLine" service posed another problem, however. Even though this service provided toll-free inward calling, it differed from conventional 800 services by using two open ends.[11] Because a call using ReadyLine service appeared to the originating LEC to be a conventional 800 call, the LEC would assess the higher CCL charge on the open originating end, as apparently required by section 69.105(b)(1)(iii). At the terminating end, that LEC assessed another higher CCL charge because the call was terminating on an open end. Addressing this situation in the *ReadyLine Clarification Order*, the Bureau said that it is "unlawful for LECs to assess [higher] CCL charges at both the originating and terminating ends on a single call."[12] The Bureau directed originating LECs to calculate settlements of the overcharges in cooperation with the affected interexchange carriers (IXCs), using customer-provided lists of 800 calls for which billing adjustments were due.[13]

B. The Complainants' 800 Services

5. The complainants are interexchange carriers who provide 800 services. A typical call using these services is routed through a LEC's exchange carrier common line

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[4] With the exception of the National Exchange Carrier Association (NECA), all of the defendants provide local exchange services either directly or through subsidiaries. Several of the defendants that are not local exchange carriers (LECs) themselves -- Centel Corporation (Centel), Cincinnati Bell, Inc. (Cincinnati Bell), Contel Corporation (Contel), GTE Corporation (GTE), and United Telecommunications, Inc. (United) -- claim that it was not proper to name them as defendants. The Bureau addressed this issue and found that the LEC subsidiaries rather than the parent entities should have been named as defendants. The Bureau concluded, however, that this error was harmless because the allegations in the complaints were sufficient to allow the parent entities to respond fully on behalf of their LEC subsidiaries, and it granted the complainants' request to name the LEC subsidiaries as defendants. The Bureau also noted that because the complainants intend to litigate the issue of damages in the district court, *see* para. 7, *infra*, the identities of the appropriate LEC subsidiaries can be specified at that time. *Bureau Order*, 7 FCC Rcd at 410 n.20. The parties have offered no arguments that would persuade us that the Bureau's conclusion on this issue is in error.

[5] The subscriber line charge is a flat per-line charge, billed to the end user, that is designed to recover for the LECs a portion of the costs of LEC plant ("local loops") that are allocated to the interstate jurisdiction.

[6] WATS-Related and Other Amendments of Part 69 of the Commission's Rules, CC Docket No. 86-1 (hereinafter *WATS Access Charge Rule Making*): Notice of Proposed Rule Making, FCC 86-1 (released Jan. 6, 1986) (*WATS NPRM*); Report and Order, FCC 86-115, 59 RR 2d 1418 (released Mar. 21, 1986) (*WATS Access Charge Order*), *reconsideration denied*, FCC 86-577 (released Jan. 15, 1987) (*Reconsideration Order*), *further reconsideration denied*, 3 FCC Rcd 496 (1988) (*Second Reconsideration Order*); Supplemental Notice of Proposed Rule Making, FCC 86-116 (released Mar. 25, 1986) (*Supplemental WATS NPRM*); Second Report and Order, FCC 86-377 (released Aug. 26, 1986) (*Second WATS Access Charge Order*).

[7] *WATS Access Charge Order*, 59 RR 2d at 1435, App. B at para. 12.

[8] In 1987, upon the recommendation of the Federal/State Joint Board, the Commission extended this approach to CCL charges through November 30, 1988. MTS and WATS Market Structure, Report and Order, 2 FCC Rcd 2953, 2954-55, 2957 (1987). The Commission later postponed the expiration date for the bifurcated system of CCL charges until March 31, 1989. MTS and WATS Market Structure, Memorandum Opinion and Order on Reconsideration and Order Inviting Comments, 3 FCC Rcd 4543, 4549 (1988) (hereinafter *MTS/WATS Reconsideration Order*). Effective April 1, 1989, section 69.105 of our rules required the LECs to set their originating CCL rates at no more than one cent ($0.01) per minute and to set their terminating CCL rates to recover the remaining interstate CCL revenue requirement. MTS and WATS Market Structure, Report and Order, 4 FCC Rcd 5048, 5051 (1988) (hereinafter *Bifurcation Order*). The originating and terminating CCL rates must be equal if the calculations otherwise specified in section 69.105 of our rules would yield a terminating rate that is less than one cent.

[9] Under section 69.105, the CCL charge is only to be assessed on an "open" end of a call, which is an end that uses exchange carrier common line plant to originate or terminate the call. A "closed" end does not use common line plant. A call can have no, one, or two open ends. *See* 47 C.F.R. § 69.105(a), (b)(1)(ii).

[10] Section 69.105(b)(1)(iii) of our rules, 47 C.F.R. § 69.105(b)(1)(iii), provides that "[a]ll open end minutes on calls with one open end (*e.g.*, an 800 or FX call) shall be treated as terminating minutes."

[11] ReadyLine service used its "customers' existing switched access local exchange lines at the terminating end rather than the dedicated access lines used to terminate AT&T's regular 800 service," thereby providing a way for customers to obtain 800 service without incurring the cost of installing dedicated lines. *See ReadyLine Order*, 2 FCC Rcd at 78.

[12] *ReadyLine Clarification Order*, 2 FCC Rcd at 5943.

[13] *Id.* at 5942-43.

plant to an 800 line provided by an intermediate IXC such as AT&T. It is then transferred from the 800 line to a complainant's facilities by another LEC. At that point, the complainant generally routes the call through a second LEC to the end user being called. If the called end user is outside the local exchange area, however, the complainant routes the call over a private line to the called end user's local exchange area and then through a LEC's exchange carrier common line plant to the called end user. In both cases, the call will originate and terminate on an open end.

C. The Complaints and the Bureau Order

6. The complainants originally initiated an action in the U.S. District Court for the District of Columbia to pursue their claims regarding alleged CCL overcharges. The district court referred the action to the Commission following an agreement between the parties that the subject matter of the suit is within the Commission's jurisdiction. The court "administratively dismissed" the suit without prejudice[14] and retained jurisdiction, noting that "either party may move to vacate the Order of Dismissal and reopen [the] case within 60 days after a final decision by the Federal Communications Commission."[15]

7. Following the dismissal by the district court, the complainants filed an "Application in the Nature of a Formal Complaint" with the Commission. The complainants contended that their 800 services are "ReadyLine-type" services because both 800 services have two open ends, and they claimed that the defendants had violated the *ReadyLine Orders* by assessing a second higher CCL charge on the terminating end of each 800 call. The complainants requested only declaratory relief from the Commission and reserved the issue of damages for their district court action, which they intend to renew following completion of the instant proceedings.

8. Most defendants responded that they do in fact assess higher CCL charges on the terminating end of the complainants' 800 calls but that they do so as required by law. The defendants denied levying any unlawful charges and claim that refunds are not warranted. Most defendants also denied that the complainants' 800 services are at all similar to AT&T's 800 ReadyLine service.

9. In its decision, the Bureau granted the complaints. First, the Bureau determined that a call using the complainants' 800 services is a single, end-to-end call, unaffected by a complainant's intermediate routing switch, not two calls as claimed by some defendants.[16] Next, the Bureau found that the 800 services at issue here and AT&T's ReadyLine services, while not identical in every way, share "such significant characteristics as two open ends and the use of an 800 line for the first leg of the call."[17] In light of that finding, the Bureau decided that the *ReadyLine Orders* are applicable in these proceedings. Applying the *ReadyLine* conclusion that it is unlawful to assess the higher CCL charge at both the originating and terminating ends of a single call, the Bureau concluded that the defendants were liable to the complainants for CCL overcharges to the extent that the defendants acted as originating local exchange carriers for calls using the complainants' 800 services.[18] Though the complainants had sought refunds from the defendants as terminating carriers, the Bureau noted that credit for the second higher CCL charge in *ReadyLine* had come on the originating end. The Bureau said that in the instant proceedings, the "defendants who were named as terminating local exchange carriers are likely also to be originating carriers for at least some of the calls utilizing the complainants' 800 services."[19] All of the defendants have requested review of the Bureau's decision.

III. DISCUSSION

A. Whether the Complainants' Service Configuration is a Single Call and is Otherwise Similar to AT&T's ReadyLine Service

10. *Contentions of the parties.* Several of the defendants[20] challenge the Bureau's finding that the complainants' call configuration is a single call and is sufficiently similar to ReadyLine calls to warrant the application of the *ReadyLine Orders*.[21] Bell Atlantic, US West, Nevada Bell,

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[14] Long Distance/USA v. Southern Bell Tel. & Tel. Co., CA No. 88-1477, Order of Dismissal (D.D.C. Sept. 22, 1988).

[15] Long Distance/USA v. Southern Bell Tel. & Tel. Co., CA No. 88-1477, Order (D.D.C. Sept. 24, 1988).

[16] *Bureau Order*, 7 FCC Rcd at 412.

[17] *Id.* at 413.

[18] *Id.*

[19] *Id.*

[20] The issues and arguments raised by the defendants are, for the most part, identical. For the sake of convenience, we will refer to the defendants' arguments as if they were part of the same pleading. To the extent that particular defendants raise separate or unique arguments, we will address them specifically. We will cite pleadings by the defendants who are Bell operating companies (BOCs) according to the name of the regional BOC, unless the pleadings were submitted separately for each individual BOC. Bell Atlantic is a regional BOC that wholly owns The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac (C&P) Company, C&P of Maryland, C&P of Virginia, C&P of West Virginia, New Jersey Bell Telephone Company, and the Diamond State Telephone Company. Ameritech wholly owns defendants Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc. BellSouth owns South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company. NYNEX owns New England Telephone and Telegraph Company and New York Telephone Company. Pacific Telesis owns The Pacific Telephone and Telegraph Company (Pacific Bell) and The Bell Telephone Company of Nevada (Nevada Bell). At the time the complaint was filed, US West owned, as separate entities, the defendants Mountain States Telephone and Telegraph (Mountain States), Northwestern Bell Telephone Company (Northwestern Bell), and Pacific Northwest Bell Telephone Company (Pacific Northwest). Effective January 1, 1991, Northwestern Bell, and Pacific Northwest merged into Mountain States. On January 2, 1991, Mountain States' name was changed to US West Communications, Inc. *See* Mountain States Telephone & Telegraph Co., 5 FCC Rcd 1982 (Com. Car. Bur. 1990).

[21] The remaining defendants, who are not mentioned in this paragraph, did not take issue with the Bureau's finding that the configuration is a single call.

Pacific Bell, Southwestern Bell,[22] Cincinnati Bell, and GTE[23] each argue that the Bureau improperly ignored important differences between the two services.[24] These defendants generally maintain that the complainants' service configuration is, unlike ReadyLine service, actually comprised of two calls and that two higher CCL charges are therefore justified. According to the defendants who analyzed the call configuration, the first call originates with the calling party and terminates at a complainant's intermediate switch. At that point, the calling party initiates a second call, which originates at a complainant's switch and terminates at the called party's line. Bell Atlantic, Nevada Bell, Pacific Bell, US West, Centel, Cincinnati Bell, GTE, and Southwestern Bell add that the Bureau invalidly based its conclusion that the configuration is one call on cases that deal with "jurisdictional" rather than "billing" issues. NYNEX and Southern New England Telephone (SNET) also argue that the complainants' services are not similar to ReadyLine service. They contend, however, that while ReadyLine service possesses two ends, both of which are open, the complainants' services "possess at least three ends": an originating open end, a closed end at a complainant's switch, and another open end at the terminating point.[25] NYNEX asserts that the originating LEC should be compensated with the higher CCL charge "for the use of the facilities used to originate the 800 call and to terminate the call at the complainants' switches," and that the terminating LEC should also be compensated with the higher CCL charge for the use of its facilities at that end.[26]

11. In their opposition to the applications for review,[27] the complainants respond that the Bureau properly dismissed the defendants' arguments regarding the similarity of their services to ReadyLine service.[28] The complainants contend that a strict application of the Commission's Part 69 rule definitions supports the Bureau's conclusion that the complainants' call configuration is one call with two open ends.[29] The complainants further maintain that the defendants' analysis of their services is inconsistent with the access charges assessed on functionally similar resold services such as simple reseller MTS-like services.[30]

12. In their replies,[31] Nevada Bell and Pacific Bell state that the complainants have failed to dispute their claim that, unlike ReadyLine, the complainants' services involve two interexchange carriers and that a second number must be dialed when the call reaches a complainant's intermediate switch.[32] They argue that the need for this second number shows that the configuration is actually two calls. In its reply, NYNEX reiterates that the complainants' services possess at least three ends.[33] Cincinnati Bell argues that the complainants' interpretation of the Commission's Part 69 rule definitions does not support the complainants' assertions that the configuration is one call.[34] According to Cincinnati Bell, the definitions simply state where origination ends and termination of a call begins for purposes of the rules.

13. *Decision.* We agree with the Bureau that a caller using the complainants' service configuration is making a single call.[35] As the Bureau correctly noted, both court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete suchP communications for

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[22] Centel merely adopts and incorporates by reference US West's Application for Review. Centel Application at 2. In addition, Centel argues that the technical configuration employed to complete a call, and not whether the call conceptually has two open ends, is determinative of the access charges to be assessed. *Id.* at 2 n.3 (citing Leased Data Services, Mimeo No. 32441 (Com. Car. Bur. June 12, 1980); Republic Telecom Emergency Request for Declaratory Ruling, Mimeo No. 1498 (Com. Car. Bur. December 18, 1985)).

[23] GTE Service Corporation filed an application for review on behalf of defendants Contel, GTE, and Hawaiian Telephone Company (collectively "GTE defendants").

[24] Bell Atlantic Application at 2 n.4; US West Application at 8-13; Nevada Bell Application at 3-5; Pacific Bell Application at 2-4; Southwestern Bell Application at 12-14; Cincinnati Bell Application at 15-18; GTE Application at 7. In addition, Nevada Bell and the GTE defendants argue that they cannot be found liable to the complainants because some or all of the complainants were not their customers. Nevada Bell Application at 2-3; GTE Application at 2.

NECA contends that because it is not a common carrier, it cannot be held liable for CCL overcharges. NECA Application at 1 n.2. We note that the Bureau found the defendants individually liable only to the extent that they provided service to the complainants and that the exact amount of damages recoverable from each defendant, if any, was not at issue in these proceedings. *See Bureau Order,* 7 FCC Rcd at 413 & n.65. As we have stated in note 4, *supra,* NECA is the only defendant that did not provide local exchange services either directly or through subsidiaries. Hence, NECA cannot be held liable for CCL overcharges.

[25] NYNEX Application at 6; *see also* SNET Application at 7.

[26] NYNEX Application at 6.6

[27] Prior to filing their consolidated opposition on February 28, 1992, the complainants filed a motion for leave to exceed page limitation and for one-day extension of time. This motion was unopposed and is granted. On March 2, 1992, the complainants filed a motion to file errata to their opposition in order to make several corrections. That motion was also unopposed by the defendants and is also granted.

On February 27, 1992, Advanced Telecommunications Corporation (ATC) filed an opposition to the defendants' applications for review in all but the US West, Centel, and NYNEX proceedings. Ameritech, Pacific Bell, Nevada Bell, BellSouth, and Southwestern Bell filed motions to strike ATC's opposition on the basis that ATC is not a party to the above-captioned proceedings. We will not accept ATC's opposition because the Commission's rules do not contemplate such a filing by a nonparty to the proceedings. We therefore grant the defendants' motions to strike and deny ATC's motion to accept a late-filed pleading.

[28] Complainants' Opposition at 14-20.

[29] *Id.* at 15-18.

[30] *Id.* at 18-20.

[31] Southwestern Bell filed a motion to file its reply out of time and Cincinnati filed a request to exceed the page limit for its reply. Both of these motions were unopposed and are granted. On April 7, 1992, over 20 days after the defendants filed their relies, the complainants filed both a motion for leave to file a surreply and a consolidated surreply. Ameritech, BellSouth, Southwestern Bell, and Cincinnati Bell all opposed the complainants' motion. The Commission's rules do not provide for the filing of a surreply, and we therefore deny the complainants' motion.

[32] Nevada Bell Reply at 4; Pacific Bell Reply at 3-4.

[33] NYNEX Reply at 3-4.

[34] Cincinnati Bell Reply at 3-4.

[35] *See Bureau Order,* 7 FCC Rcd at 412.

defining the nature of the communications.[36] According to these precedents, we regulate an interstate wire communication under the Communications Act from its inception to its completion. Such an interstate communication does not end at an intermediate switch. As the Bureau correctly noted, this view of our jurisdiction under the Act gives rise to an assumption that the interstate communication itself extends from the inception of a call to its completion, regardless of any intermediate facilities.[37] Applying this principle to the case before us, we conclude that the configuration is a single interstate communication that does not become two communications because it passes through intermediate switching facilities. While several defendants attempt to distinguish the so-called "jurisdictional" nature of a call from its status for "billing" purposes, they fail to provide a persuasive argument or any authority to support their contention that this distinction should have legal significance.

14. NYNEX claims that the complainants' services have three ends, with a third end at the complainants' intermediate switches, and that the complainants owe higher CCL charges to the originating LEC "for the use of the facilities to originate the 800 call and to terminate the call at the complainants' switches," and to the terminating LEC "for the additional use of LEC facilities in terminating the call."[38] Even if we were to find that a third, intermediate end did exist in this configuration, we disagree that the existence of that end would alter the CCL rates that the complainants should pay to the originating and terminating LECs. NYNEX relies on the premise that the originating LEC is also providing facilities at the supposed intermediate end. Because the configuration described in the record does not show that the same LEC would be handling the call at these two points, we reject the NYNEX premise and the argument based on it.

15. In general, all of the defendants' arguments on this issue ignore or reject the fact that the complainants' services convey a single communication from the caller to the called party. Indeed, from the caller's point of view, any intermediate switching during the call is transparent. The record reflects that the user of the complainants' services intends to make a single call terminating not at a complainant's intermediate switch, where the 800 leg of the call's journey ends, but at the telephone line of the called party. Thus, to the caller, the complainants' services are identical to ReadyLine, regardless of whether that caller must, as a minor variation, dial a second number at some point before the call is completed.[39]

16. As the Bureau noted, the complainants' services are not identical in every respect to ReadyLine service. Nonetheless, we agree with its finding that significant characteristics, such as two open ends and the use of an 800 line for the first portion of the call, exist in each. Because any differences between the services are immaterial to the matter before us, the Bureau properly concluded that the complainants' configuration is "virtually identical" to the ReadyLine configuration and that the *ReadyLine Orders* provide the relevant analysis of this matter.[40]

B. Whether Two Higher CCL Charges Were Assessed

17. *Contentions of the parties.* Ameritech, BellSouth, US West, Southwestern Bell, and Cincinnati Bell argue that the Bureau improperly assumed,[41] that the originating LECs assessed a higher CCL charge on the IXC providing the underlying 800 service and that the IXC passed this charge on to the complainants.[42] Southwestern Bell further contends that the credit mechanism in place for refunding the higher CCL charge assessed on the originating end of some 800 services refutes the Bureau's assumption that two higher CCL charges were assessed on the complainants' services.[43] In addition, some defendants argue that the IXCs providing the underlying 800 service should have been joined as parties to this proceeding because those IXCs were directly assessed the higher CCL charge on the originating end and passed that charge on to the complainants.[44] In their opposition, the complainants respond that there is no reason to believe that the IXCs would have claimed a credit for the assessment of the higher CCL charge on the originating end of the complainants' services and that to have claimed such a credit would have violated the Commission's rules and policies.[45] In its reply, Ameritech contends that the IXCs providing underlying 800 service should have claimed a credit for the higher CCL charge under the Commission's rules and policies.[46] Nevada Bell, Pacific Bell, and NYNEX reiterate that

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[36] *See* National Ass'n of Regulatory Utility Comm'rs v. FCC, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (hereinafter *NARUC);* United States v. AT&T, 57 F. Supp. 451, 454 (S.D.N.Y. 1944); New York Telephone Co., 76 FCC 2d 349, 352 (1980).

[37] *Bureau Order,* 7 FCC Rcd at 412.

[38] NYNEX Application at 5-6 (citing MTS and WATS Market Structure, Mimeo No. 1498, para. 24, 28 (released December 18, 1985) (Commission found that a certain call configuration could be described as having three ends)).

[39] From the caller's perspective, the dialing of an 800 number followed by a second number would be similar to a caller using a carrier's 800 access code to, first, gain access to the carrier's network and, then, specifying the called party's line number. The similarity between such a service configuration and the complainants' services is not at issue here, but we note that to a caller, each would appear to be a single call.

[40] *Bureau Order,* 7 FCC Rcd at 413.

[41] Ameritech asserts that referral to an administrative law judge (ALJ) is necessary to resolve these disputed assumptions. *See* Ameritech Application at 9. We disagree and find that the record herein is adequate for us to be able to resolve the issues raised by the parties. The necessary facts are present in this record, and the issues were fully briefed by the parties.

[42] Ameritech Application at 8; US West Application at 16; BellSouth Application at 10; Southwestern Bell Application at 10-11; Cincinnati Bell at 9-10. Nevada Bell and Pacific Bell, while acknowledging that the higher CCL charge is assessed on the originating end, state that "[w]hether or not the intermediate IXC passes this charge along to the complainants is unclear." Nevada Bell Application at 6; Pacific Bell Application at 5. Bell Atlantic, Ameritech, US West, and GTE also appear to acknowledge that the higher CCL charge is assessed but challenge the Bureau's assumption that the CCLh))charges assessed against the IXC providing the underlying 800 service are included in the IXC's rates to the complainants. Bell Atlantic Application at 4; Ameritech Application at 8; US West Application at 17; GTE Application at 11.

[43] Southwestern Bell Application at 10-11.

[44] *E.g.,* Southwestern Bell Application at 11; US West Application at 15-16; Cincinnati Bell Application at 8-9; NYNEX Application at 7-8.

[45] Complainants' Opposition at 26-27.

[46] Ameritech Reply at 3.

there is no evidence that the higher CCL charge was a component of the IXC's rates for the 800 service portion of the call.[47] Southwestern Bell replies that because it has already issued credits for the higher CCL charge to the IXC providing 800 service, two higher CCL charges have not been assessed.[48]

18. *Decision.* As several of the defendants appear to acknowledge,[49] the originating LECs did, in fact, assess the higher CCL charge on the originating end of the 800 portion of the call. Indeed, the configuration of the underlying 800 service induced that assessment. Viewed independently of the remainder of the call configuration,[50] the underlying 800 service originates on an open end and terminates on a closed end.[51] Because the originating LEC would know only that the call is using an 800 service, it would assume that the call has only one open end, as is the case with most 800 calls, and that the higher CCL charge is therefore appropriate on the originating end.[52] Consequently, we conclude that the Bureau correctly found that the originating LECs did assess the higher CCL charge. Further, we find unpersuasive the defendants' suggestion that the IXC providing the 800 service may have chosen not to pass on the CCL charge to its customers, the complainants. They offer no plausible rationale for such a decision on the IXC's part. Moreover, the Commission has recognized that carrier common line charges are included in the rates for the services that an underlying carrier provides to resellers.[53] In addition, because we have found that the higher CCL charge was assessed on the IXCs providing 800 service and that the IXCs included that charge in their 800 rates, the participation of the IXCs providing 800 service is not essential to these proceedings.

C. Liability for the CCL Overcharges

19. *Contentions of the parties.* All of the defendants argue in some manner that the Bureau improperly imposed liability on them, regardless of whether the complainants' configuration is one call or two. Nevada Bell, Pacific Bell, BellSouth, Bell Atlantic, Ameritech, US West, NYNEX, and GTE each claim that the Bureau erred because, as terminating LECs, they imposed the higher CCL charge on the terminating end in accordance with the requirements of section 69.105 of our rules and should not have been held liable if overcharges existed on the originating end.[54] Several of the defendants also argue that the Bureau's finding of liability exceeded its delegated authority by effecting an improper, retroactive change in the Commission's rules.[55] Southwestern Bell and United claim that they are being exposed to double liability because they have already issued credits to the IXC for assessing the higher CCL charge on the originating end of services sold to the complainants.[56]

20. Bell Atlantic, Ameritech, US West, Cincinnati Bell, GTE, SNET, and Southwestern Bell also contend that the Bureau found, without support from the record, that the defendants were likely to have been originating as well as terminating carriers.[57] Southwestern Bell, US West, NYNEX, Cincinnati Bell, and GTE note that the Bureau granted relief that the complainants did not seek by finding the originating LECs liable.[58] US West asserts that regardless of the: call configuration, no refund is owed to the complainants.[59] Southwestern Bell, US West, and United maintain that the complainants had no customer-carrier relationship with the originating LECs and could only look to the IXCs providing 800 service for a refund based on CCL overcharges on the originating end.[60]

21. In their opposition, the complainants maintain that a prior Commission ruling requires LECs to provide credits so as to avoid imposing the higher CCL charge on both ends of a ReadyLine-type service.[61] The complainants contend that the Bureau's decision was not a retroactive rule change because the Bureau was simply applying relevant precedent.[62] The complainants also claim that they did not seek relief from the defendants on the terminating end of their services only.[63] The complainants further state that they did have a customer-carrier relationship with at least some if not all of the defendants.[64] In their replies, the defendants generally reiterate their original arguments.

22. *Decision.* Aside from their "two-call" argument, which we have discussed above, the defendants do not appear to challenge the Bureau's conclusion that a single call with two open ends should not be assessed two higher

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[47] Nevada Bell Reply at 3; Pacific Bell Reply at 2; NYNEX Reply at 3.

[48] Southwestern Bell Reply at 5.

[49] Bell Atlantic Application at 4; Ameritech Application at 8; US West Application at 17; Nevada Bell Application at 6; Pacific Bell Application at 5; GTE Application at 11.

[50] This analysis does not imply that the two portions of the complainants' call configuration are separable for purposes of CCL assessment.

[51] *See infra* para. 5.

[52] *See* 47 C.F.R. § 69.105(b)(1)(iii) ("All open end minutes on calls with one open end (*e.g.*, an 800 or FX call) shall be treated as terminating minutes.").

[53] *See WATS Access Charge Order*, 59 RR 2d at 1432 (resellers should not have to make double contribution toward recovery of common line costs); *WATS NPRM*, FCC 86-1, para. 12 & n.29 (reseller makes CCL contribution indirectly through rates for the services it resells).

[54] Nevada Bell Application at 5-7 (denies that the complainants were customers but states that higher charge was proper on terminating end); Pacific Bell Application at 4-6; BellSouth Application at 4; Bell Atlantic Application at 2-4; Ameritech Application at 3-4, 6; US West Application at 4; NYNEX Application at 6; GTE Application at 9-10.

[55] *See, e.g.*, US West Application at 18-19; BellSouth Application at 7-9; Cincinnati Bell Application at 7-8.

[56] *See, e.g.*, Southwestern Bell Application at 9-10; United Application at 6. Several other defendants contend that originating LECs may now be exposed to double liability. BellSouth Application at 16; Cincinnati Bell Application at 12; NECA Application at 6-9.

[57] Bell Atlantic Application at 3-4; Ameritech Application at 14; US West Application at 17-18; Cincinnati Bell Application at 11; GTE Application at 10-11; SNET Application at 9; Southwestern Bell Application at 5.

[58] Southwestern Bell Application at 9; US West Application at 14-15; NYNEX Application at 7; Cincinnati Bell Application at 5-6; GTE Application at 11.

[59] *See* US West Application at 13.

[60] Southwestern Bell Application at 8-9, 11; US West Application at 15-16; United Application at 6.

[61] Complainants' Opposition at 13-14, 22-23.

[62] *Id.* at 13-14.

[63] *Id.* at 6-8.

[64] *Id.* at 10-13.

CCL charges.[65] Indeed, when the Commission adopted the provisions governing CCL charges, it did not state or even imply that any call configuration would require or permit the assessment of two higher CCL charges.[66] As we have already found, the originating LECs did assess the higher CCL charge on the originating end of 800 calls, and several of the defendants have acknowledged that they assessed the higher chargeon the terminating end.[67] Therefore, given that the complainants were unlawfully assessed a second higher CCL charge, we must now determine on whom to place liability for the overcharges.

23. The Bureau determined that the defendants were likely to have been originating carriers for 800 service calls and are liable for the CCL overcharges. The defendants now challenge this determination, claiming that they acted only as terminating carriers who lawfully assessed the higher CCL charge. They suggest that any liability should be borne by the originating LECs who actually provided originating access, or by the underlying 800 service provider, who passed on the originating charge to the complainants. Another theory is that only the underlying 800 service provider, who actually paid the originating CCL charges, can claim credits.

24. We affirm the Bureau's approach. First, we must clarify that the Bureau did not place liability for the overcharges on the defendants in their role as terminating carriers.[68] Instead, the Bureau found that the defendants were liable to the extent that they had acted as originating carriers. We agree with the Bureau that it is likely that the defendants, with territories covering most of the United States, acted as originating carriers for calls utilizing the complainants' 800 services. The Bureau's approach, which adjusts the originating CCL charges to the lower rate, follows the remedy ordered in *ReadyLine*. The result of the Bureau's approach is that the complainants would pay the lower CCL rate on the originating end and the higher rate on the terminating end. This scheme is explicitly contemplated by section 69.105 of our rules for certain types of calls. As such, the Bureau did not effect a retroactive change in the rules.

25. Unlike the situation in *ReadyLine*, however, the actual originating LECs for specific calls are not identifiable here. Because of the way these services are configured, the complainants do not receive the signalling information from the originating end necessary to identify that LEC. Without the ability to identify the originating LECs, the parties would have to develop a surrogate to apportion liability. We agree with the Bureau that surrogates can be an acceptable method by which to apportion damages.[69] For example, a reasonable surrogate might be developed by using LEC data that would indicate the ratio between a defendant's 800 revenues or minutes and the total nationwide figure, or a ratio between the number of lines in a defendant's territory and the total number of lines in the U.S. This surrogate could be used to calculate the approximate amount of originating traffic using the complainants' services that each defendant handled, thus allowing a reasonable measure of the damages for which each defendant is responsible.

26. The defendants have suggested that the IXC providing the underlying 800 service should bear liability to the complainants for the CCL overcharges or that only the IXC, not the complainants, can claim credit for these overcharges on the originating end. We disagree with these analyses. The IXCs providing 800 service, who are not parties here, should not bear liability to the complainants because they did not act unlawfully in merely passing through the higher CCL charges that they paid on the originating end of the call configuration. Moreover, contrary to certain defendants' claims that they may already have issued credits to the underlying IXC on the originating end, we note that such an IXC alone would not have grounds to request credits for these charges. The 800 service portion of the configuration, viewed independently of the remainder of the single call, had an open originating end and a closed terminating end. Hence, a higher CCL charge on the originating end of the 800 portion alone would be proper. Because an underlying IXC could not itself request credit for the originating CCL charges, it should not be held liable to the complainants.

IV. CONCLUSION

27. For the reasons discussed above, we deny the defendants' requests for review of the Common Carrier Bureau's decision in the above-captioned proceedings. We conclude that the defendants, in their roles as originating local exchange carriers, unlawfully assessed the higher carrier common line charge on the originating end of the complainants' 800 services.[70] To the extent that any of the defendants or their subsidiaries[71] did not act as originating carriers, they are not liable to the complainants. The complainants have stated an intention to pursue the issue of damages in their district court action, and we therefore do not reach that issue here.[72]

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[65] *Bureau Order*, 7 FCC Rcd at 413.

[66] *See Bifurcation Order*, 4 FCC Rcd at 5051-53; 47 C.F.R. § 69.105; *see also WATS Access Charge Order*, 59 RR 2d at 1432, 1444 (only one higher CCL charge specified for single calls), *cited in ReadyLine Clarification Order*, 2 FCC Rcd at 5942.

[67] Pacific Bell Application at 5; BellSouth Application at 4; Bell Atlantic Application at 3; US West Application at 4; NYNEX Application at 6; Ameritech Application at 3-4, 6; GTE Application at 9-10.

[68] We note that at this stage of the proceedings, the complainants are not arguing that the defendants should be held liable only as terminating carriers for the overcharges. *See* Complainants' Opposition at 6-8.

[69] Although damages are not at issue in this proceeding, any later apportionment of damages would have to rely on a surrogate.

[70] Given our action herein, we dismiss as moot Cincinnati Bell's request for stay and motion to strike the complainants' opposition to the stay request.

[71] *See* n.4, *supra*.

[72] Because the complainants did not reserve the right to file supplemental complaints on the issue of damages, the Commission has before it no further issues to be decided in these proceedings.

V. ORDERING CLAUSES

28. ACCORDINGLY, IT IS ORDERED, pursuant to sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 208, that the applications for review filed by the above-captioned defendants ARE DENIED to the extent indicated in this Order.

29. IT IS FURTHER ORDERED that the complainants' Motion for Leave to Exceed Page Limitation and for One-Day Extension of Time filed on February 28, 1992, and the complainants' Motion to File Errata to Opposition filed on March 2, 1992, ARE GRANTED.

30. IT IS FURTHER ORDERED that the motions to strike Advanced Telecommunications Corporation's opposition filed by Ameritech, Pacific Bell, Nevada Bell, BellSouth, and Southwestern Bell on March 10, 11, and 12, 1992, ARE GRANTED.

31. IT IS FURTHER ORDERED that the Advanced Telecommunications Corporation's Motion to Accept Late-Filed Pleading filed on March 24, 1992, IS DENIED.

32. IT IS FURTHER ORDERED that the complainants' Motion for Leave to File Surreply Based on Newly-Raised Points in Respondents' Replies filed on April 7, 1992, IS DENIED.

33. IT IS FURTHER ORDERED that the Cincinnati Bell's Request for Stay filed on February 12, 1992, and Motion to Strike filed on March 12, 1992, ARE DISMISSED.

34. IT IS FURTHER ORDERED that Southwestern Bell's Motion to File Reply Out of Time filed on March 10, 1992, IS GRANTED.

35. IT IS FURTHER ORDERED that Cincinnati Bell's Motion for Leave to Exceed Page Limit filed on March 12, 1992, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI OF SEATTLE, INC.

Appeal of Local Rate Order of
City of Renton, WA

ORDER

Adopted: December 28, 1994; Released: December 28, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. TCI of Seattle, Inc. ("TCI"), the franchisee in the above matter, filed on September 14, 1994 an Appeal of Local Cable Rate Order adopted on August 15, 1994 by its local franchising authority, the City of Renton, Washington ("the City"). The Rate Order establishes a new regulated rate schedule for TCI's basic service tier rates and associated equipment.[1] Specifically, the City's Rate Order requires TCI to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.

2. In its review of TCI's Form 393, the City approved TCI's permitted rates for its basic service tier and installations, but ordered TCI to keep its rates for converter boxes and remote controls at the current levels, rather than at the higher, maximum permitted levels.[2] TCI argues that because of this misapplication of the Commission's rate regulations, the City has improperly reduced TCI's regulated revenues by setting its rates for converter boxes and remote controls below the levels permitted under the benchmark regime and has imposed a refund liability that is greater than the level allowed under our rules. TCI argues that it should be permitted to offset refund liability for basic rates with its undercharges in equipment rates. On September 27, 1994, the City filed a Response to Appeal, urging the Commission to reject TCI's appeal and to allow the City's Rate Order to go into effect unchanged. Specifically, the City argues that the permitted rates for equipment, derived from the Form 393 TCI filed on December 27, 1993, greatly exceed both what it was then charging for cable service in the City, and what it was charging in surrounding franchises. Further, the City argues that TCI failed to demonstrate that its December 27, 1993 equipment rates were justified, despite being given opportunity to do so. TCI filed a Reply to the City's Response on October 7, 1994, but did not address this second argument.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[7] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[8] After

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[1] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[2] On the Cover Sheet (Part I) of its Form 393, TCI's maximum permitted rate for remote controls is listed as $ 0.19 per month, while its actual rate is listed as $ 0.10 per month. Likewise, TCI's maximum permitted rates for converter boxes are listed as $ 1.12 and $ 2.31 per month, while its actual rates are listed as $ 0.60 and $ 1.08 per month, respectively. The City set TCI's rates for remote controls and converter boxes at $0.10, $0.60, and $1.08 per month, respectively.

[3] *See* 47 C.F.R. § 76.944.

[4] *See Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266*, 8 FCC Rcd 5631, 5731 (released May 3, 1993) (*"Report and Order"*); *Third Order on Reconsideration in MM Docket 92-266*, FCC 94-40, slip op. at ¶ 81 (released March 30, 1994) (*"Third Recon. Order"*).

[5] *Id.*

[6] *Id.*

[7] To the extent that an operator has sought to take advantage of the refund deferral period available under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266*, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[8] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an

calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of the Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from calculation of an hourly service charge and application of that charge to different types of installations. Under our regulations, the maximum permitted rates are deemed to be reasonable, as required by the 1992 Cable Act.[9] Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[10]

6. If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. A franchising authority should not require the operator to set a particular rate for programming, equipment or installations at any rate less than its maximum permitted rate, even if its current or actual rate is below its maximum permitted rate. Instead, the franchising authority should allow the operator to charge up to its maximum permitted rates, as derived by Form 393.[11]

7. After setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.[12] If an operator's aggregate revenues computed from its actual rates exceed its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.[13] If the operator's aggregate revenues computed from its permitted rates exceeded its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by TCI should be calculated based on this method.

8. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[14] Thus, the City must offset or reduce any refunds it may order by the difference between the actual equipment rates that TCI charged and the maximum permitted rates that it could have charged during the applicable period of review.[15] In this proceeding, the City states that TCI failed to justify the equipment rates it derived in its Form 393, despite being provided the opportunity to do so. However, the City has submitted no evidence in support of its position that TCI has not justified its rates.[16] The data TCI has submitted and the computations TCI has made in its Form 393 are not challenged. The City claims only that the resulting rates are "much greater than other [franchisees' and competitors'] rates as to raise a presumption of invalidity."[17] Without further explanation and support for its position, we cannot conclude that the decision of the City is reasonable in rejecting TCI's maximum permitted rates for converter boxes and remote controls, as those rates are calculated in TCI's Form 393. We are remanding this case to the City so that it can enter a ruling consistent with these findings.

9. Accordingly, IT IS ORDERED that TCI of Seattle, Inc.'s appeal of The City of Renton's local Rate Order, regarding the issue of TCI Cablevision's permitted charges for converter boxes[4] and remote controls and related refunds is REMANDED to the local franchising authority for resolution in accordance with the terms of this Order.

10. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[9] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[10] If a franchising authority required an operator to set its rates for equipment and installations below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installations at levels below actual cost.

[11] *TCI Cablevision of North Central Kentucky, Inc.*, DA 94-1479 (Dec. 14, 1994). An operator is not required, however, to raise its rates to the maximum permitted level. An operator may voluntarily choose to charge less than the maximum permitted rate.

[12] *See* 47 C.F.R. § 76.942.

[13] *See Third Recon. Order* at ¶ ¶ 103-104 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

[14] *See Report and Order* at 5731; *Third Recon. Order* at ¶ 81.

[15] *See Third Recon. Order* at ¶ ¶ 103-104.

[16] We note also that the City has accepted all of TCI's other maximum permitted rate calculations. The City appears to be of the view that those calculations are sufficiently justified but is of the opposite view with respect to the maximum permitted equipment rates at issue where the latter are higher than TCI's actual rates.

[17] *See* City's Response to Appeal at 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC Cable Systems LOI-93-1
McBain, Michigan
Zeeland Charter
Township, Michigan

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1994; Released: December 30, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received letters from the City of McBain ("McBain") and Zeeland Charter Township ("Zeeland"), Michigan and 14 other communities in Michigan alleging violations by C-TEC Cable Systems ("C-TEC") of Commission regulations governing the provision of cable television service.[1] In response to these complaints, the Commission issued Letter of Inquiry 93-1 ("LOI") to C-TEC on November 17, 1993.[2] The LOI asked C-TEC to provide information concerning, among other issues, its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated in McBain, Zeeland Charter Township and the 14 other Michigan communities.[3] C-TEC responded to our LOI with responses dated December 17, 1993, December 29, 1993, February 2, 1994 and May 13, 1994.[4]

2. This Order addresses the regulatory status of C-TEC's offerings only in McBain and Zeeland Charter Township. The other 14 Michigan communities addressed in our LOI sought, by letter to the Commission, to withdraw their Form 329 rate complaints.[5] In orders released on December 12, 1994, December 19, 1994, and December 29, 1994, the Cable Services Bureau granted the communities' requests to withdraw their 329 complaints against C-TEC. In addition to granting the communities' request, the orders terminated the Bureau's review of the rate justification proceedings initiated by the complaints. There is now neither a valid rate complaint nor a pending rate case respecting C-TEC in any of the 14 communities referenced above. Moreover, these 14 communities have each requested, by separate letters, that the Commission discontinue its investigation into the issues set forth in Letter of Inquiry 93-1. Under all these circumstances, we believe that the public interest is not served by our continuing the inquiry of C-TEC with respect to 14 of the 16 Michigan communities addressed in LOI-93-1.

II. BACKGROUND

3. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming service.[6] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[7]

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[1] The other 14 Michigan communities are: Wayland Township, City of Grayling, City of Grand Haven, City of Greenville, Caledonia Charter Township, Village of Spring Lake, Village of Pentwater, City of Stanton, City of Hudsonville, Robinson Township, City of Rockford, Cannon Township, City of Cadillac, and Grand Haven Charter Township.

[2] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Michael J. Mahoney, Executive Vice President, C-TEC Cable Systems, Dallas, PA, LOI 93-1 (November 17, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there are pending rate complaint proceedings involving C-TEC's McBain and Zeeland Charter Township systems. Our decisions made herein will be made a part of those proceedings.

[3] The LOI also requested information concerning negative option billing and C-TEC's compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of C-TEC's a la carte package. Other issues in the LOI will be dealt with subsequently.

[4] We note that C-TEC's February and May responses to our LOI indicate that it may no longer offer the same allegedly non-rate-regulated packages of channels that it offered on November 17, 1993, the date of our Letter of Inquiry. *See* Letters from Gardner F. Gillespie, Hogan & Hartson L.L.P., to Roy J. Stewart, Chief, Mass Media Bureau, FCC (February 2, 1994 and May 13, 1994). C-TEC states that in March of 1994 it restructured its service offerings. C-TEC explains that it decreased the number of channels available individually and in the Premium Customer Choice packages, reduced the prices of the packages and the individual channels and, in some instances, recreated cable programming service tiers. While C-TEC makes these general assertions, it never provided information about any alleged restructuring specific to McBain and Zeeland. We further note that C-TEC's a la carte offerings, first made available in September of 1993 and subsequently, allegedly revised in March of 1994, are the subject of a pending Petition for Declaratory Ruling in which Zeeland is a petitioner. In this Order, we only examine C-TEC's packages of individually available channels as they existed on the date of our LOI, November 17, 1993.

[5] We note that the Form 329 complaints submitted by each of the 14 Michigan communities are the only valid complaints on file against C-TEC in these franchise areas.

[6] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2).

[7] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

4. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[8] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[9] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[10] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[11] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[12] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

5. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[13] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[14] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[15]

6. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[16] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

A. McBain System

7. Before September 1, 1993, C-TEC's services in McBain were comprised of a 23 channel basic tier, called Basic Cable, for $21.95 per month.

8. The following chart summarizes C-TEC's service tier offerings in McBain prior to September 1, 1993:

Offering	Channels	Price
Basic Cable	23	$21.95
Total	23	$21.95

9. On September 1, 1993, the date our rate regulations became effective, C-TEC restructured its McBain service offerings. C-TEC's restructured services in McBain included a 13 channel basic tier, called Basic Cable, for $16.00 per month, and 10 channels offered on an individual basis and in an a la carte package called Premium Customer Choice. The 10 channels were Nickelodeon, The Discovery Channel, Turner Network Television (TNT), The Nashville Network (TNN), PASS/Country Music TV, ESPN, Cable News Network (CNN), Arts & Entertainment (A&E), Headline News, and Music TV (MTV). All 10 channels were originally contained in C-TEC's Basic Cable tier.

10. C-TEC states that beginning September 1, 1993, all 10 a la carte channels were offered on an individual basis at a price of $2.00 per channel per month. C-TEC further states that all 10 channels could be purchased as a package for $5.95 per month.

11. The following chart summarizes C-TEC's McBain service tier options as of the date of its response to our LOI:[17]

Offering	Channels	Price
1. Basic Cable	13	$16.00
2. Premium Customer Choice	10	$ 5.95
Total	23	$21.95

12. C-TEC argues, *inter alia*, that it began offering its services in McBain individually and through the Premium Customer Choice package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of the date of its response, C-TEC states that on its McBain system there were no subscriptions to the individual channels in the Premium Customer Choice package, while 140 of C-TEC's 168 McBain subscribers purchased the package.

B. Zeeland Charter Township System

13. C-TEC serves Zeeland Charter Township from two systems, Blendon/Hudsonville and Holland. Before September 1, 1993, C-TEC's services on its Blendon/Hudsonville system in Zeeland Charter Township consisted of a 33 channel basic tier for $21.95 per month. Before September 1, 1993, C-TEC's services on its Holland system in Zeeland Charter Township consisted of a 12 channel basic tier,

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[8] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[9] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1).

[10] *Id.*

[11] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2).

[12] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[13] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

[14] H.R. Rep. No. 628 at 79.

[15] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[16] *Rate Order* ¶ 451.

[17] This Order does not evaluate C-TEC's McBain rates for its basic service tier. These rates are subject to review by the local franchising authority in a separate proceeding.

called Limited Basic, for $13.00 per month, and a 20 channel cable programming services tier, called Expanded Basic, for $8.95 per month.

14. The following chart summarizes C-TEC's service tier offerings on its two Zeeland Charter Township systems prior to September 1, 1993:

Blendon/Hudsonville System

Offering	Channels	Price
Basic tier	33	$21.95
Total	33	$21.95

Holland System

Offering	Channels	Price
1. Limited Basic	12	$13.00
2. Expanded Basic	20	$ 8.95
Total	32	$21.95

15. On September 1, 1993, the date our rate regulations became effective, C-TEC restructured its two Zeeland Charter Township service offerings. C-TEC's restructured services on its Blendon/Hudsonville system in Zeeland Charter Township included a 16 channel basic tier for $13.00 per month, and 17 channels offered on an individual basis and in an a la carte package called Premium Customer Choice. The 17 channels were Nickelodeon, The Discovery Channel, Turner Network Television (TNT), The Nashville Network (TNN), Cable News Network (CNN), Arts & Entertainment (A&E), Headline News, Music TV (MTV), USA Network, Lifetime, Comedy Central, The Weather Channel, PASS/Country Music TV, American Movie Classics (AMC), VH-1, ESPN, and CNBC. All 17 channels were previously contained in C-TEC's basic tier on its Blendon/Hudsonville system. C-TEC states that all 17 a la carte channels were offered individually at a price of $2.00 per channel per month. C-TEC further states that all 17 channels could be purchased as a package for $8.95 per month.

16. C-TEC's restructured services on its Holland system in Zeeland Charter Township included a 16 channel basic tier for $13.00 per month, and 16 channels offered on an individual basis and in an a la carte package called Premium Customer Choice. The 16 channels were Nickelodeon, The Discovery Channel, Turner Network Television (TNT), The Nashville Network (TNN), Cable News Network (CNN), Arts & Entertainment (A&E), Headline News, Music TV (MTV), USA Network, Lifetime, Comedy Central, The Weather Channel, PASS/Country Music TV, VH-1, ESPN, and CNBC. C-TEC indicates that 14 of the 16 channels included in the Premium Customer Choice package were previously contained in the Expanded Basich) tier. C-TEC indicates that CNN was originally included in the basic tier on its Holland system and that Comedy Central was a new offering. C-TEC states that all 16 a la carte channels were offered individually at a price of $2.00 per channel per month. C-TEC further states that all 16 channels could be purchased as a package for $8.95 per month.

17. The following chart summarizes C-TEC's service tier offerings on its two Zeeland Charter Township systems as of the date of its response to our LOI:[18]

Blendon/Hudsonville System

Offering	Channels	Price
1. Basic tier	16	$13.00
2. Premium Customer Choice	17	$ 8.95
Total	33	$21.95

Holland System

Offering	Channels	Price
1. Basic tier	16	$13.00
2. Premium Customer Choice	16	$ 8.95
Total	32	$21.95

18. C-TEC argues, *inter alia*, that it began offering its services in Zeeland Charter Township individually and through the Premium Customer Choice package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of the date of its response, C-TEC indicates that there was only one subscription to individual channels in Zeeland Charter Township, while 590 of C-TEC's 763 Zeeland Charter Township subscribers purchased the packages offered by the two systems.

IV. DISCUSSION

19. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[19] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the |Cable| Act or our rules contrary to the intent of the Act or its underlying policies."[20] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[21] First, we examine whether C-TEC's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

20. The tables of C-TEC's service tier options as of the date of our LOI for both McBain and Zeeland show a fundamental change in the services offered to subscribers. C-TEC fundamentally changed its service to subscribers by removing 10 channels from regulation on its McBain system, 17 channels on its Blendon/Hudsonville system in Zeeland, and 15 channels on its Holland system in Zeeland. Furthermore, in the case of its Holland system, C-TEC eliminated the entire cable programming service tier.

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[18] This Order does not evaluate C-TEC's Zeeland Charter Township rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

[19] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[20] *Rate Order* ¶ 451.

[21] *Id.* at ¶ 453.

With regard to the channels C-TEC removed from regulation, C-TEC avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent (and denied its customers who received the Premium Customer Choice package in McBain and Zeeland the benefit of the reduced price to which rate regulation entitled them). That is, if C-TEC had not restructured its service offerings on its new system on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates.

21. We believe that C-TEC has not provided a sufficient justification for this change to overcome our finding that there is an evasion of rate regulation. To the contrary, virtually all of C-TEC's subscribers to its basic tier on its McBain and Blendon/Hudsonville systems and to its cable programming service tier on its Holland system were given substantially the same package of channels that they received before the September 1, 1993 restructuring. (C-TEC states that only one subscriber on its Zeeland systems actually subscribed to individual channels instead of the Premium Customer Choice package and that no subscribers on its McBain system actually subscribed to individual channels instead of the package.) Other than an attempt to evade rate regulation, there appears to be no sufficient justification for this restructuring.

22. Other factors corroborate our finding that C-TEC's restructuring had the effect of evading rate regulation. First, C-TEC restructured its offerings on the eve of regulation. Second, it automatically subscribed its customers to the offerings that previously had been part of its basic and cable programming service tiers. In light of these facts, we find that C-TEC's restructuring of its offerings constituted an evasion of our rate regulation rules.

23. Because C-TEC's restructuring is a purported collective offering of a la carte channels, we also must determine whether the offering met the Commission's requirements for a permissible collective offering of a la carte channels. If the offering met the Commission's requirements for a permissible offering of a la carte channels, then C-TEC would not have evaded our rate regulations because it would not have been required to reduce its price for the collective a la carte package.[22]

24. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[23] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[24] This is not the type of offering that C-TEC and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from tiers that would be subject to our rate regulations.

25. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[25]

26. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the prices for the combined packages do not exceed the sum of the individual charges for the channels that comprise the a la carte packages. In McBain, the price for the individual channels is $2.00 per month and the price for the 10 channel package is $5.95. In the Blendon/Hudsonville system, the price for the individual channels is $2.00 per month and the price for the 17 channel package is $8.95 per month. In the Holland system, the price for the individual channels is $2.00 per month and the price for the 16 channel package is $8.95. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of C-TEC's submission reveal that there were no subscriptions to individual "a la carte" channels on its McBain80 system, while 140 of C-TEC's 168 McBain subscribers purchased the Premium Customer

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[22] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) (*"Going Forward Order"*). Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 46. However, in order to determine whether C-TEC evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[23] *Rate Order* ¶ 329.

[24] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[25] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of a la carte channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

Choice package. On C-TEC's Zeeland systems, there was one subscription to individual "a la carte" channels, while 590 of C-TEC's 763 Zeeland subscribers purchased the Premium Customer Choice Package. These facts, together with the other factors present in this case,[26] tend to show, in this instance, that the per-channel offerings do not constitute a realistic service offering.

27. Even if we were to apply the 15 interpretative guidelines set forth in our *Second Reconsideration Order*,[27] we still would conclude that C-TEC's offerings do not constitute a realistic service offering. C-TEC's submission reveals additional evidence weighing against a finding that its individual a la carte channels constitute a realistic service offering. A "significant percentage" of channels in the package was "removed from regulated tiers," which would "weigh against unregulated treatment."[28] In this case, 100 percent of the channels in the McBain and Blendon/Hudsonville packages and over 90 percent of the channels in the Holland package was removed from regulated tiers.

28. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible.[29]

29. We do not believe, however, that our a la carte rules are unclear as applied to the fact pattern at issue in this case. In the *Rate Order* we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate-regulated tier an a la carte package.[30] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[31] This, however, is essentially what C-TEC did in its three systems.

30. In its Holland system, C-TEC evaded rate regulation by eliminating entirely its cable programming service tier and moving 15 channels from rate-regulated tiers to create an allegedly unregulated package. The 15 channels removed from rate regulation were: Nickelodeon, The Discovery Channel, Turner Network Television (TNT), The Nashville Network (TNN), Cable News Network (CNN), Arts & Entertainment (A&E), Headline News, Music TV (MTV), USA Network, Lifetime, The Weather Channel, PASS/Country Music TV, VH-1, ESPN, and CNBC. All of these channels, with the exception of CNN, were removed from the former cable programming service tier. One channel, Comedy Central, was added to create the new 16 channel package.

31. In its Blendon/Hudsonville system, C-TEC evaded rate regulation by moving 17 channels out of the 33 comprising its only rate-regulated tier into an allegedly unregulated package. While C-TEC did not literally eliminate a cable programming service tier in this system, as it did in Holland, the same 14 channels that it shifted from its cable programming service tier in its Holland system were shifted from its basic tier in Blendon/Hudsonville to create the allegedly unregulated 17 channel package. In addition, two of the remaining three channels in the Blendon/Hudsonville system's allegedly unregulated package (CNN and Comedy Central) were also included in the Holland system's a la carte package. [32]

32. In its McBain system, C-TEC evaded rate regulation by moving 10 channels out of the 23 comprising its only rate-regulated tier into an allegedly unregulated package. While C-TEC did not literally eliminate a cable programming service tier in this system, as it did in Holland, the same nine channels that it shifted from its cable programming service tier in its Holland system were shifted from its basic tier in McBain to create to the allegedly unregulated 10 channel package. In addition, the remaining channel in the McBain system's allegedly unregulated package (CNN) was also included in the Holland system's a la carte package.[33]

33. While we have acknowledged that aspects of our evaluation of a la carte packages were unclear,[34] as applied to these particular facts, our test is clear and requires no additional guidance or explanation from the Commission. Turning a large rate-regulated tier into an a la carte package as C-TEC essentially did in its Holland system by eliminating entirely its cable programming service tier and moving 14 of the 20 channels from that tier to an allegedly unregulated package is an evasion of rate regulation. Likewise, taking as many as 17 channels (in the Blendon/Hudsonville system) or 10 channels (in the McBain system) from regulated tiers is such an evasion. Therefore, we find that C-TEC's retiering in both McBain and Zeeland constitutes an evasion of rate regulation.

34. We find that C-TEC's Premium Customer Choice packages, as they existed in McBain and Zeeland on November 17, 1993, the date of our LOI, must be treated as rate-regulated cable programming service tiers. We further conclude that these packages are rate-regulated offerings as of September 1, 1993, and that the channels composing them must be counted as rate-regulated channels for purposes of rate justification as of that date.

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[26] *See, e.g.*, ¶ ¶ 20-22, *supra*.

[27] *Id.* at ¶ 196.

[28] *Id.*

[29] In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered an evasion of rate regulation. *See Going Forward Order* at ¶ 40.

[30] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[31] *Second Reconsideration Order* ¶ 196.

[32] CNN was shifted from the Holland system's former basic tier to its allegedly unregulated package and Comedy Central was a new offering on that system. AMC, which is included in the Blendon/Hudsonville system's allegedly unregulated package, is not included in the Holland system's package.N

[33] CNN was shifted from the Holland system's former basic tier to its allegedly unregulated package.

[34] *Warner Cable Communications*, Milwaukee, Wisconsin, LOI-93-14, DA 94-1276 (released November 18, 1994).

V. ORDERING CLAUSES

35. Accordingly, IT IS ORDERED that C-TEC's a la carte packages in the City of McBain and Zeeland Charter Township, Michigan, as they existed on November 17, 1993, are subject to rate regulation as of September 1, 1993, and the channels composing them must be counted by C-TEC as rate-regulated channels for purposes of rate justification, as of that date.

36. IT IS FURTHER ORDERED that the inquiry initiated by LOI-93-1 is terminated with regard to Wayland Township, City of Grayling, City of Grand Haven, City of Greenville, Caledonia Charter Township, Village of Spring Lake, Village of Pentwater, City of Stanton, City of Hudsonville, Robinson Township, City of Rockford, Cannon Township, City of Cadillac, and Grand Haven Charter Township.

37. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service — **MM Docket No. 94-131**

and

Implementation of Section 309(j) of the Communications Act - Competitive Bidding — **PP Docket No. 93-253**

ORDER GRANTING EXTENSION OF TIME FOR FILING COMMENTS AND REPLY COMMENTS

Adopted: January 4, 1995; Released: January 6, 1995

By the Chief, Mass Media Bureau:

1. On December 1,, 1994, the Commission released a *Notice of Proposed Rulemaking (Notice)*, FCC 94-293, 9 FCC Rcd 7665 (1994), 59 Fed. Reg. 63,743 (Dec. 9, 1994), in this proceeding, soliciting comment on revisions to our rules and procedures that will improve the Multipoint Distribution Service (MDS) application processes. The filing date for comments is currently January 9, 1995, and the date for filing reply comments is currently January 24, 1995.

2. On January 3, 1995, the Wireless Cable Association International, Inc. (WCAI) filed a request for an extension of time to submit comments in this proceeding. WCAI requests that the time afforded interested parties to submit comments be extended by two weeks, to January 23, 1995, and the time afforded for filing reply comments be extended to February 7, 1995. WCAI states that the Commission, in this *Notice*, proposes a wide variety of rule changes to govern the auctioning of MDS licenses and to regulate the provision of MDS services in the future. Of particular concern to WCAI is a possible change in the definition of protected service area for MDS stations. WCAI asserts that it has been working diligently to develop a proposal that will accommodate the Commission's goals without unduly restricting the wireless cable industry, and believes that it will be able to achieve a consensus at a quarterly meeting of the WCAI Board of Directors scheduled for January 10, 1995.

3. Pursuant to Section 1.46 of the Commission's rules, 47 C.F.R. Section 1.46, it is our policy that extensions of time for filing comments in rulemaking proceedings shall not be routinely granted. However, under the circumstances described above, we believe that this brief extension of time to file comments and reply comments is warranted in light of the complexity of technical issues raised in this proceeding. Accordingly, IT IS ORDERED, that the request for extension of time filed by the Wireless Cable Association International, Inc. IS GRANTED, the time for filing comments in this proceeding IS EXTENDED to January 23, 1995, and the time for filing reply comments in this proceeding IS EXTENDED to February 7, 1995.

4. This action is taken pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 4(i) and 303(r), and Sections 0.204(b), 0.283 and 1.415 of the Commission's rules, 47 C.F.R. Sections 0.204(b), 0.283 and 1.415.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MOUNTAIN BROOK CABLEVISION, INC.

Petition for Revocation
of Certification of
the City of Vestavia Hills, Alabama (AL0497)
to Regulate Basic Cable Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 1995; Released: January 10, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On February 3, 1994, Mountain Brook Cablevision Inc., ("Cablevision") filed a petition for revocation challenging the certification of the City of Vestavia Hills, Alabama, ("the City") to regulate rates for basic cable service and associated equipment.[1] The City submitted a letter opposing Cablevision's petition to which Cablevision filed a reply. In addition, both parties filed supplements pursuant to a recent Commission Order.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Once the period for filing petitions for reconsideration has elapsed, cable operators may file petitions for revocation.[7] However, regardless of its grounds, a petition for revocation does not automatically trigger a stay of rate regulation.[8]

II. DISCUSSION

3. In its petition, Cablevision states that its system is subject to effective competition because it serves fewer than 30 percent of the households within the City of Vestavia Hills, the franchise area.[9] Specifically, Cablevision states that it serves 95 of the 7,710 households (that is, occupied housing units)[10] in the City, or 1.2 percent of the total number of households. As supporting documentation, Cablevision provides household data derived from the 1990 Census Report for the City of Vestavia Hills which indicates that there are 7,710 households in the franchise area.[11] Cablevision also submits a copy of a computer print-out with sufficient subscriber information to support its claim that it serves 95 households in the franchise area.

4. The City concedes that Cablevision was issued a nonexclusive franchise to serve the entire City of Vestavia Hills consisting of approximately 7,710 households. The City's objection to Cablevision's petition, however, is based on its contention that Cablevision has made an affirmative decision to limit its actual service area[12] to a subdivision

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[1] The City filed its "Certification of Franchising Authority to Regulate Rates for Basic Cable Service and Initial Finding of Effective Competition" ("FCC Form 328") on September 13, 1993. Its certification became effective on October 13, 1993.

[2] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b)(4). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.914.

[8] 47 C.F.R. § 76.914(d).

[9] The Cable Act (Communications Act 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the franchise area subscribe to the system's cable service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[10] As the Commission stated recently, "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupies housing units. *See* Bureau of the Census, 1990 Census of Population and Housing, Summary Population and Housing Characteristics, Alabama, 1990 CPH-1-2 Appendix B at B-8.

[11] As the Bureau stated recently, the 1990 Census data is an appropriate source for household data. 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[12] In the *First Order on Reconsideration*, the Commission clarified the definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (1993) (*"First Recon. Order"*). Generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more

within the City consisting of 95homes. As such, the City claims that Cablevision has "redefined" the franchise area for purposes of the effective competition standard. In support of this argument, the City claims that despite entering into a franchise agreement with Cablevision in October of 1987, Cablevision has yet to offer (and does not appear to be planning to offer) services to any household outside of the aforementioned subdivision. Furthermore, the City claims that, because Cablevision allegedly refuses to offer competing services to any household served by the City's alternative CATV provider, TCI Cablevision, the franchise area used to measure effective competition should be the 95 homes currently served. Using this standard, the City argues that Cablevision serves 100 percent of the households, and therefore, is not subject to effective competition.

5. In reply, Cablevision argues that it has never limited service within the franchise area, nor does it intend to do so. In fact, Cablevision claims that "it has experienced steady subscriber growth during a very difficult period for the cable industry."[13] Cablevision also argues that should the Commission find that Cablevision has redefined its franchise area, the Commission should also find that Cablevision meets the competing provider test for effective competition set forth in the 1992 Cable Act and our rules.[14] Cablevision offers statistical information in support of this claim.[15]

6. As a preliminary matter, we are not persuaded that the appropriate franchise area for purposes of effective competition in this case is some area other than the entire City of Vestavia Hills. The City does not provide adequate evidence to support its claim that Cablevision has made an affirmative decision to limit its service to the subdivision in which Cablevision serves 95 households. One basis for the City's conclusion stems from a claim that "Cablevision has never attempted to offer service to any house served by TCI."[16] The City, however, does not substantiate this claim with any evidence (such as a refusal by Cablevision to expand into those areas or any other evidence). In its opposition, the City also asserts that an unnamed "local cable official" made the comment that "expansion of Cablevision's service would only result in a price war.[17] Such a comment might, under appropriate circumstances and taken together with other facts, be some evidence of intent to limit a franchise area. Here, however, the City gives no indication as to who made this alleged statement, or when, or to whom, or under what circumstances. Nor is it clear how the City came upon this allegation. Therefore, we are unable to give the allegation much weight. Finally, we remind the City that "[t]he fact that a franchise area has not yet been filled out by construction of a system would not by itself be taken as redefining the service area."[18] In light of foregoing, we do not find that Cablevision has made an affirmative decision to limit its service area. Therefore, we will not address its argument that it meets the competing provider effective competition test in any such alleged redefined franchise area.

7. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[19] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[20] Cablevision has met this burden. Specifically, Cablevision appropriately relied on data reflecting the number of households as required by our rules.[21] Relying on this data, Cablevision has submitted sufficient evidence demonstrating that its cable system serving the City, its franchise area, serves 95 of the 7,710 households in the City of Vestavia Hills, or 1.2 percent of the total number of households. Thus, we find Cablevision's system serving the City of Vestavia Hills is subject to effective competition. Accordingly, its petition is granted.

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restricted definition of "franchise area" may be appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's franchise area'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision... to restrict service." *Id.*

[13] *See* December 7, 1994 letter from Mountain Brook Cablevision.

[14] One of the bases on which a cable system is deemed subject to effective competition is if the franchise area is: 1) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area. Communications Act of 1934 § 623(l)(1)(B), 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2).

[15] In its response, Cablevision argues that it faces effective competition from TCI, in a purported redefined franchise area, which, it claims, has a total of 320 households. As indicated above, the City of Vestavia Hills argues that the redefined franchise area is comprised of the 95 households currently served by Cablevision. This "redefined" franchise in which Cablevision makes its competitive provider claim refers to the same geographic location as the City's alleged redefined franchise area. However, Cablevision bases its claim on the total number of households which both it and TCI *pass* (i.e., 320 households), rather than the total number of households that Cablevision currently *serves* (i.e., 95 households). As such, Cablevision states that its system offers service to all (320) households, and actually provides service to 95 households, or 29 percent of the households in the purported redefined franchise area. With respect to TCI, Cablevision states that TCI offers comparable service to 167 of the 320 households, and actually provides service to more than 55 households. Thus, Cablevision argues that 1) TCI offers service to more than 50 percent of the households in Cablevision's alleged redefined franchise area; and 2) TCI provides service to more than 15 percent of the households within the City. As supporting documentation, Cablevision provides a chart which indicates that there are 320 households passed by both Cablevision and TCI in the alleged redefined franchise area. In addition, Cablevision points to a declaration under penalty of perjury of the Vice President of Cablevision who analyzed Cablevision's subscriber and service records as well as direct field observations conducted by company representatives.

[16] *See* August 18, 1994 letter from City of Vestavia Hills.

[17] Id.

[18] *First Recon. Order, supra.*

[19] 47 C.F.R. § 76.906.

[20] 47 C.F.R. § 76.911(b)(1).

[21] *Third Recon. Order, supra.*

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the petition for revocation filed by Mountain Brook Cablevision, Inc., challenging the certification of the City of Vestavia Hills, Alabama, to regulate its basic cable service IS GRANTED.

9. IT IS FURTHER ORDERED that the certification granted to the City of Vestavia Hills, Alabama, to regulate Mountain Brook Cablevision Inc.'s basic cable rates IS RESCINDED.

10. This action is being taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FALCON TELECABLE

Petition for Reconsideration of Certification

of the Certification of the City of
Sinton, Texas to Regulate Basic
Cable Rates (TX0741)

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 1995; Released: January 10, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 1, 1993, Falcon Telecable ("Falcon") filed a timely Petition for Reconsideration of Certification challenging the certification of the City of Sinton, Texas ("Sinton") to regulate rates for basic cable service and associated equipment.[1] Sinton did not file an opposition to Falcon's Petition. At the Commission's request, Falcon filed additional information on November 23, 1994 and December 20, 1994.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of theinitial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6]

II. DISCUSSION

Petitioner's Contentions

3. Falcon bases its challenge on the competing provider test for effective competition set forth in the 1992 Cable Act and our rules.[7] Falcon argues that its system serving Sinton is subject to effective competition because its franchise area is: 1) served by itself and Omnivision of Corpus Christi, Texas ("Omnivision"), an unaffiliated wireless cable provider, and that each of them offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to Omnivision, the smaller provider, exceeds 15 percent of the households in the franchise area.

4. Falcon's pleadings, and the Census information[8] submitted therewith, indicate that, as of 1990, there were 2,031 "housing units"[9] in Sinton, the franchise area. Falcon's pleadings state that its cable system passes 2,144 housing units.[10] In addition, Falcon states that it serves 765 of the 2,031 housing units or 37.7 percent of the total number of housing units. Falcon submits a computer print-out indicating that it passes 2,144 homes in the franchise area. This same print-out demonstrates with sufficient detail that Falcon serves 765 subscribers. Falcon also submits a copy

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[1] Sinton filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on September 7, 1993, which became effective October 7, 1993.

[2] Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).

[3] 47 C.F.R. §§76.906, 76.910(b)(4).

[4] 47 C.F.R. §76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. §76.910(b). *See also* Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).

[5] 47 C.F.R. §§1.106, 76.911. *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[6] 47 C.F.R. §76.911(c).

[7] The 1992 Cable Act and the Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. Communications Act of 1934 §623(a)(2), 47 U.S.C. §543(a)(2); 47 C.F.R. §76.905(a). One of the bases on which a cable system is deemed subject to effective competition is if the franchise area is: 1) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area. Communications Act of 1934 §623(l)(1)(B), 47 U.S.C. §543(l)(1)(B); 47 C.F.R. §76.905(b)(2).

[8] As the Commission stated in the *Effective Competition Order*, the 1990 Census is an appropriate source for household data. *Effective Competition Order, supra*.

[9] "Housing units" are not the same as "households," the term used in the Cable Act and the Commission's rules. The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. "Housing units" reflect occupied and unoccupied units.

[10] Falcon states that it passes 2,144 housing units, yet the 1990 Census data filed by Falcon acknowledges only 2,031 total housing units and 1,809 occupied housing units. Since the Census data is for 1990, the discrepancy may be reasonably attributed to housing growth in Sinton. Falcon's data is therefore accepted for purposes of calculating the number of households passed. Nonetheless, for the sake of consistency in our effective competition orders, we will rely upon the Census data numbers for the total number of housing units and households in the City of Sinton.

of its channel guide which demonstrates that it provides 37 channels of programming, including at least 27 non-broadcast channels.[11] Finally, Falcon submits a declaration under penalty of perjury attesting to the accuracy of the information submitted by Falcon.[12]

5. With respect to Omnivision, Falcon states that Omnivision is available to all of the housing units in Sinton (*i.e.*, 2,031 of the 2,031 housing units) or 100 percent of the total number of housing units in the franchise area. In addition, Falcon states that Omnivision serves 568 of the 2,031 housing units, or 27.9 percent of the total number of housing units in the franchise area. As support, Falcon submits a letter from Omnivision, in which Omnivision states that its wireless cable system serves 568 subscribers in Sinton.[13] In addition, Falcon submits a copy of Omnivision's channel line-up, which demonstrates that Omnivision offers 31 channels of video programming, including at least 25 non-broadcast channels.

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[14] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[15] Based on the totality of the evidence presented, we find that Falcon has met this burden.

Disposition of Falcon's Competing Provider Effective Competition Claim

7. The first prong of the competing provider test for effective competition requires that the franchise area be served by at least two unaffiliated multichannel video programming distributors ("MVPD"), each of which offers comparable programming to at least 50 percent of the households in the franchise area.[16] The information filed by Falcon indicates that it passes 100 percent of the 2,031 housing units in the franchise area and that Omnivision passes 100 percent of the 2,031 housing units in the franchise area. The 1990 Census data submitted by Falcon shows that there are 2,031 total housing units (i.e. occupied and unoccupied housing units), including 1,809 households (i.e. occupied housing units) in the franchise area. Thus, it is clear that the term "housing units" as used by Falcon refers to total housing units, not to households. Yet our rules require the number of households to be the reference point for purposes of gauging effective competition under this test, just as it is required under the low penetration test.[17] However, we recognize that determining the number of households (i.e. occupied housing units) which are passed by a cable operator, as opposed to the number which exist in the franchise area, may not be easily accomplished. Such information is not provided by the Census data we routinely urge operators to rely upon, and we understand that such information may not generally be available to or easily collected by operators. Because we are concerned to identify franchise areas which are subject to effective competition between or among providers, we will examine the totality of the evidence submitted by Falcon to see if conclusions can be drawn from it about the percentage of households passed by Falcon and Omnivision.

8. In a previous case involving a cable operator's claim of effective competition in an unrelated franchise area, the Commission made certain calculations based on the evidence presented to determine whether two cable operators offered service to at least 50 percent of the households in the franchise area.[18] Here, if we subtract the total number of households (1,809) from the total number of housing units the 1990 Census data show for Sinton (2,031), we find that 222 housing units, or approximately 11 percent of total housing units, were unoccupied. If we apply this same ratio to the number of "homes" Falcon claims it passes, we arrive at a rough "households passed" number of 1,908. Alternatively, if we assume as a worst case that Falcon passes all of the unoccupied housing units in the franchise area, and so subtract those 222 unoccupied housing units from 2,144, the number of "homes" Falcon claims it passes in 1994, we are left with a total of 1,922 households passed. Under either scenario, the evidence permits us to reasonably conclude that Falcon passes at least 50 percent of the households in the franchise area.

9. As evidence that Omnivision, the wireless cable operator which is Falcon's alleged competitor, offers programming to at least 50 percent of the households in Sinton, Falcon states that "Omnivision operates from Corpus Christi, Texas, less than twenty miles from Sinton."[19] Falcon argues that the close proximity and flat terrain between Corpus Christi and Sinton make it apparent that Omnivision's service is technically available to all of the homes within the Sinton franchise area.[20] As further evidence that Omnivision's wireless service is technically available and that citizens of Sinton are reasonably aware of its presence, Falcon states that Omnivision has 568 subscribers within the Sinton franchise area.[21] The Commission has stated that service of a multichannel video programming distributor will be deemed "offered" for pur-

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[11] Competing multichannel video programming providers ("MVPD") must offer comparable video programming to households in the franchise area. *See* 47 C.F.R. §76.905(b)(2). As the Commission has stated previously, in order to provide "comparable" video programming, a MVPD must provide at least 12 channels of video programming, including at least one non-broadcast channel. *See Rate Order*, at 5667.

[12] *See* Declaration of Gerald Ellman, Falcon Telecable Regional Manager.

[13] Section 76.911(b)(2) of the Commission's rules authorizes a cable operator to request from a competitor information regarding the competitor's reach and subscribership, and requires the competitor to respond. The response, however, may be limited to simply a statement of numerical totals. *See* 47 C.F.R. §76.911(b)(2).

[14] 47 C.F.R. §76.906.

[15] 47 C.F.R. §76.911(b)(1).

[16] 47 C.F.R. §76.905(b)(2)(i).

[17] *See* Communications Act of 1934 §623(l)(1)(A), 47 U.S.C. §543(l)(1)(A); 47 C.F.R. §76.905(b)(1) (measuring low penetration effective competition by percentage of households subscribing to cable in the franchise area); Communications Act of 1934 §623(l)(1)(B), 47 U.S.C. §543(l)(1)(B); 47 C.F.R. §76.905(b)(2) (measuring competing provider effective competition by percentage of households passed and percentage of households subscribing to cable in the franchise area).

[18] *Blue Ridge Cable Television, Inc., Petition for Reconsideration of Certification of the Township of Heidelberg, Pennsylvania to Regulate Basic Cable Service Rates* (FCC Community ID No. PA0742), DA 94-1525, (released: December 20, 1994).

[19] Falcon Petition at 4.

[20] Falcon Petition at 4.

[21] Falcon states that potential subscribers in Sinton are also aware of the availability of Omnivision because of a high-profile retransmission dispute in the Corpus Christi area to which Omnivision was a vocal participant. Falcon Petition at 5.

poses of the statutory effective competition tests when the service is both "technically and actually available."[22] To be considered technically and actually available, a wireless cable operator's:

> central transmitter must be in place in the franchise area and fully operational [and] . . .[o]nce a [wireless] operator has initiated operation, the service will be deemed "offered" to those subscribers residing in the interference-free contour. . . those subscribers also must be reasonably aware that [wireless] service is available to them.[23]

In light of the fact that Sinton is only 20 miles from Omnivision's central transmitter, we find it reasonable that Sinton is in Omnivision's interference-free contour zone. The Commission also finds that potential subscribers are reasonably aware that Omnivision's service is available to them. The evidence shows that 568 of the 1,809 households, or 31 percent of the households in the Sinton franchise area, currently subscribe to Omnivision. In addition, the evidence shows that Omnivision has been engaged in vigorous public debate involving broadcast retransmission in the Sinton area. Based on these findings, we conclude that Omnivision offers service to at least 50 percent of the households in the franchise area.

10. With regard to the issue of programming comparability, we find that Falcon has submitted sufficient evidence that the programming of the two operators are comparable. The channel lineups for both operators submitted by Falcon establish that each operator offers over 30 channels with more than 25 non-broadcast channels -- this satisfies the Commission's programming comparability criteria.[24]

11. With regard to the second prong of the competing provider effective competition test, we find that the evidence shows that more than 15 percent of the households in the franchise area subscribe to the multichannel video programming distributor other than Falcon, the largest MVPD.[25] Here, Falcon has submitted sufficient evidence that Omnivision, the smaller of the two competitors, serves 568 subscribers out of the 1,809 households, or 31 percent of total households.

12. As Falcon has submitted sufficient evidence demonstrating that its cable system serving the City of Sinton is subject to effective competition from a wireless cable operator, its petition is granted.

III. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Falcon Telecable challenging the Certification of the City of Sinton, Texas IS GRANTED.

14. IT IS FURTHER ORDERED that the certification of the City of Sinton, Texas to regulate Falcon Telecable's basic cable rates IS RESCINDED.

15. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, as amended.[26]

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[22] *Rate Order* at 5654. The Commission stated that "[s]ervice will be deemed technically available when the multichannel video programming distributor is physically able to deliver service to a household wishing to subscribe, with only minimal additional investment by the distributor, if necessary." *Id.* at 5654-55. The Commission also stated that "service must be actually available, with no regulatory, technical, or other impediments to households taking service. . .[and] that for service to actually be available, potential subscribers in the franchise area must reasonably be aware that the services of the multichannel video programming distributor can be purchased by them." *Id* at 5656 (footnote omitted).

[23] *Rate Order* at 5658. The Commission defined an interference free contour as "those areas to which the [wireless] operator is capable of providing video programming free of interference." *Id.*

[24] *See* n.11, *supra*.

[25] Falcon serves 42 percent of the total number of households in Sinton, while Omnivision serves 31 percent.

[26] 47 C.F.R. §0.321.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI OF NORTHERN
NEW JERSEY

Appeal of Local
Rate Orders of State of New Jersey
Board of Public Utilities

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 1995; Released: January 10, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. TCI of Northern New Jersey ("TCI"), the franchisee in the above matter, filed on August 24, 1994 an Appeal of a local cable Rate Order adopted on July 7, 1994[1] by its franchising authority, the New Jersey Board of Public Utilities ("the Board").[2] The Board submitted an Opposition to the Appeal on September 2, 1994. The Rate Order establishes a new regulated rate schedule for TCI's basic service tier rates and associated equipment.[3] Specifically, the Board's Rate Order requires TCI to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.

2. TCI alleges that the Board approved the lower of TCI's maximum permitted rates and its actual rates for each of its regulated services, rather than allowing TCI to charge its maximum permitted rates for each category of regulated service. TCI argues that because of this misapplication of the Commission's rate regulations, the Board has improperly reduced TCI's regulated revenues by setting some of its rates below the levels permitted under the benchmark regime and has imposed a refund liability that is greater than the level allowed under our rules. TCI also argues that the Board inappropriately set its rates for A/B switches and VCR installations. TCI asserts that the rates charged for the provision of A/B switches and the installation of VCRs lie outside the purview of local rate regulation. The Board, in its Opposition, states that it reasonably applied the Commission's rules in ordering a refund that did not authorize a balancing of past overcharges and undercharges. The Board argues that no mechanism exists to provide the offsetting approach requested by TCI. The Board also argues that A/B switches and the installation of VCRs should be subject to rate regulation. The Board contends that A/B switches should be regulated because a subscriber has no need for an A/B switch unless that subscriber also receives basic service. The Board also contends that VCR installations are essentially the same as the connection of televisions to the basic service tier and should, similarly, be regulated.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[4] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[5] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering the local rate order.[6] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[7]

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[8] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its permitted programming rates, while in Part III, the operator calculates its permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

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[1] TCI states that a copy of the order was first received by TCI by mail on July 25, 1994. TCI asserts that the release date could therefore not be deemed to be any date before July 25, 1994. The New Jersey Board of Public Utilities, in its Opposition to the Appeal, does not challenge TCI's position with respect to the release date. Therefore, we will deem TCI's appeal to be timely filed.

[2] Along with its Appeal of Local Cable Rate Order, TCI also filed a Request for Emergency Stay on May 9, 1994. Because we are resolving this dispute on the merits presented in the appeal, the petition for stay has been rendered moot.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[4] *See* 47 C.F.R. § 76.944.

[5] *See Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266*, 8 FCC Rcd 5631, 5731 (released May 3, 1993) (*"Report and Order"*); *Third Order on Reconsideration in MM Docket 92-266*, 9 FCC Rcd 4316, 4346 (released March 30, 1994) (*"Third Recon. Order"*).

[6] *Id.*

[7] *Id.*

[8] To the extent that an operator has sought to take advantage of the refund deferral period available under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266*, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

A. Calculation of Maximum Permitted Rate Levels

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[9] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from calculation of an hourly service charge and application of that charge to different types of installations. Under our regulations, maximum permitted rates for programming, equipment and installation are deemed to be reasonable, as required by the 1992 Cable Act.[10] Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[11]

6. If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. A franchising authority should not require the operator to set a particular rate for programming, equipment or installations at any rate less than its maximum permitted rate, even if its current or actual rate is below its maximum permitted rate. Instead, the franchising authority should allow the operator to charge up to its maximum permitted rates, as derived by Form 393.[12] In this proceeding, the Board did not dispute either the validity of the figures used in TCI's Form 393 or the accuracy of the calculations in the form. Therefore, the Board should allow TCI to charge its maximum permitted rates, as derived by the Form 393.

7. After setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds in relation to past overcharges. A refund liability may be imposed by the franchising authority when an operator's actual charges exceed their maximum permitted levels during the applicable period of review.[13] If an operator's aggregate revenues computed from its actual rates exceed its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.[14] If the operator's aggregate revenues computed from its permitted rates exceed its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by TCI should be calculated based on this method.

8. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[15] For instance, in this case, the City may not order TCI to set its equipment rates below maximum permitted levels. Further, the City must offset or reduce any refunds it may order by the difference between the actual equipment rates that TCI charged and the maximum permitted rates that it could have charged during the applicable period of review.[16] According to TCI's uncontested submission, the City has directed TCI to charge less than its maximum permitted levels for certain components of its regulated service and to issue refunds without regard to the fact that some rates are below maximum permitted levels. We are remanding this case to the City so that it can enter a ruling consistent with these findings.

B. A/B Switches

9. In response to TCI's second argument concerning the regulation of A/B switches that are used to receive off-the-air broadcast signals, we have previously held that such switches are not devices directly related to the delivery of basic cable service and therefore their price should remain unregulated.[17] Regulated equipment consists of equipment in the subscriber's home that is used to receive regulated cable service.[18] The A/B switches at issue are used by

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[9] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[10] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[11] If a franchising authority required an operator to set its rates for equipment and installations below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installations at levels below actual cost. This result would be contrary to both the 1992 Cable Act and our rules.

[12] An operator is not required, however, to raise its rates to the maximum permitted level. An operator may voluntarily choose to charge less than the maximum permitted rate.

[13] *See* 47 C.F.R. § 76.942.

[14] *See Third Recon. Order* at 4353 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

[15] *See Report and Order* at 5731; *Third Recon. Order* at 4346.

[16] *See TCI Cablevision of North Central Kentucky*, DA 94-1479 (released December 14, 1994); *Third Recon. Order* at 4353.

[17] *See SBC Media Ventures (Montgomery County, MD)*, DA 94-1251, at ¶ ¶ 16-17 (released November 22, 1994).

[18] *See* 47 C.F.R. § 76.923(a).

subscribers to switch off cable services and to receive, instead, off-the-air broadcast signals. The switches are used only by cable subscribers who choose not to watch cable programming. Since the switches are not "equipment used by subscribers to receive the basic service tier" within the meaning of Section 3(b)(3) of the 1992 Cable Act,[19] their price is not subject to regulation.

C. VCR Installations

10. We disagree with TCI that the regulatory treatment accorded to A/B switches should be accorded to VCR installations as well. TCI had established two different charges to install a subscriber's VCR by connecting the VCR to the subscriber's cable service. One charge applied to the operator's installation of the VCR during the subscriber's initial installation of cable service. A second, and higher, charge applied to the operator's installation of the subscriber's VCR if a separate trip by the cable technician were required. The 1992 Cable Act directed us to establish rate standards for installation and lease of equipment used to receive the basic service tier.[20] Our rules provide that regulated equipment consists of all equipment in a subscriber's home used to receive basic service.[21] Rates for installation of such equipment must be based on actual costs and must be "unbundled" or priced separately.[22] When basic service is installed through a subscriber's VCR, the VCR is used "to receive the basic service tier."[23] Since VCRs are, indeed, used "to receive the basic service tier," TCI's charges for VCR installations are subject to our rate regulations. Those charges must comport with the actual cost standard of our rules.

11. Accordingly, IT IS ORDERED that TCI of Northern New Jersey sappeal of the New Jersey Board of Public Utilities' local Rate Order, regarding the issue of TCI's permitted charges for converter boxes and remote controls is REMANDED to the local franchising authority for resolution in accordance with the terms of this Order.

12. IT IS FURTHER ORDERED that TCI of Northern New Jersey's appeal of the New Jersey Board of Public Utilities' local Rate Order, regarding the regulatory status of TCI's A/B switches is REMANDED to the local franchising authority for resolution in accordance with the terms of this Order.

13. IT IS FURTHER ORDERED that TCI of Northern New Jersey's appeal of the New Jersey Board of Public Utilities' local Rate Order, regarding the regulatory status of TCI's VCR installations is DENIED.

14. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[19] *See* Communications Act, § 623(b)(3), 47 U.S.C. § 543(b)(3).
[20] *Id. See also* 47 C.F.R. § 76.923(a).
[21] 47 C.F.R. § 76.923(a).
[22] 47 C.F.R. § 76.923 (b). *See also Report and Order* at 5810 ("[W]e will require separate charges for each significantly different type of ... installation.")
[23] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

RIGEL CSSF JOINT VENTURE

Petition for Reconsideration

of the Certification of
the City of Springfield, Georgia
to Regulate Basic Cable Service Rates
(GA0545)

MEMORANDUM OPINION AND ORDER

Adopted: January 10, 1995; Released: January 11, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On February 7, 1993, Rigel CSSF Joint Venture, ("Rigel") filed a timely petition for reconsideration challenging the certification of the City of Springfield, Georgia ("the City") to regulate rates for basic cable service and associated equipment.[1] The City did not file an opposition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless thefranchise authority has actual knowledge to the contrary.[3] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[6]

II. DISCUSSION

3. Rigel argues that its system serving the City of Springfield, Georgia, its franchise area, is subject to effective competition because the system serves fewer than 30 percent of the homes within its franchise area.[7] Rigel states that it serves two of the 491 homes in Springfield or less than one percent of the total number of homes. As support, Rigel submits a declaration under penalty of perjury from a responsible company official[8] who, relying on a specific cite in the 1990 Census, states there are 491 "homes" in the City. In addition the declaration states that the cable system serves two subscribers.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[9] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[10] Based on all of the evidence before us, we find that Rigel has met this burden.

5. Contrary to Rigel's assertion, the Census data it cites does not indicate that there are 491 "homes" in the franchise area. Rather it indicates that there are 567 housing units and 526 occupied housing units in Springfield.[11] Our rules require the use of data reflecting the number of households in the franchise area. *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994).[12] Relying on the data for occupied

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[1] The City filed its "Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on December 3, 1993. Its certification became effective on January 22, 1994.

[2] Communications Act of 1934 § 623 (a)(4), 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See* also 47 U.S.C. § 543 (a)(4).

[5] 47 C.F.R. §§1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The Cable Act (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)) and the Commission's rules (47 C.F.R. § 76.905 (a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the system. Communications Act of 1934, § 623 (l)(1)(A), 47 U.S.C. § 543 (l)(1)(A); 47 C.F.R. § 76.905 (b)(1).

[8] Declaration dated January 17, 1994, signed by Mr. Douglas J. Feltman, President, Rigel CSSF Joint Venture. In this declaration, Mr. Feltman cites to the 1990 Census of Housing, Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Housing, General Housing Characteristics, (State of Georgia) Table 1, at 8.

[9] 47 C.F.R. § 76.906.

[10] 47 C.F.R. § 76.911(b)(1).

[11] "Housing units" are not the same as "households," the term used in the Cable Act and the Commission's rules. The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census and population, CP-1-1B, Appendix B at B-8. "Housing units" reflect occupied and unoccupied units.

[12] As the Commission noted recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994). The term "household" is

housing units, a comparison of the number of subscribers Rigel claims to have (two) in relation to the number of occupied housing units yields a penetration level of .3 percent. Thus, we find that Rigel's cable system serving Springfield, Georgia is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the petition for revocation filed by Rigel CSSF Joint Venture, challenging the certification of Springfield, Georgia, to regulate Rigel's basic cable rates IS GRANTED.

7. IT IS FURTHER ORDERED that the certification filed by Springfield, Georgia, to regulate Rigel CSSF Joint Venture's basic cable rates IS RESCINDED.

8. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

defined by Census Bureau to include only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

RIGEL CSSF JOINT VENTURE

Petition for Revocation

of the Certification of
the City of Port Wentworth, Georgia,
to Regulate Basic Cable Service Rates
(GA0736)

MEMORANDUM OPINION AND ORDER

Adopted: January 10, 1995; Released: January 11, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Rigel CSSF Joint Venture, ("Rigel") filed a petition for revocation challenging the certification of the City of Port Wentworth, Georgia, ("the City")[1] to regulate rates for basic cable service and associated equipment.[2] The City filed a response, indicating that they did not desire to challenge Rigel's petition at this time.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective. However, regardless of its grounds, a petition for revocation does not automatically trigger a stay of the franchising authority's power to regulate basic rates.[6]

II. DISCUSSION

3. Rigel argues that its cable system is subject to effective competition because the system serves fewer than 30 percent of the "homes" in the City of Port Wentworth, its franchise area.[7] Rigel claims that it serves only 179 of the 1,370 "homes" in its franchise area or 13 percent of the total number of "homes". As support, Rigel submits a declaration under penalty of perjury from a responsible company official[8] who, relying on a specific cite in the 1990 Census, states that there are 1,370 "homes" in the City. In addition, the declaration states that the cable system serves 179 subscribers.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[9] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[10] Based on all of the evidence before us, we find that Rigel has met this burden.

5. Contrary to Rigel's assertion, the Census data it cites does not indicate that there are 1,370 "homes" in the franchise area. Rather it indicates that there are 1,647 housing units and 1,500 occupied housing units in Port Wentworth.[11] Our rules require the use of data reflecting

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[1] The City filed its Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on September 1, 1993. Its certification became effective on October 1, 1993.

[2] The City filed a pleading styled as a "petition for reconsideration." We note, however, that the City's certification became effective on October 1, 1993. Thus, a petition for reconsideration challenging the City's certification must have been filed no later than October 30, 1994. *See* 47 C.F.R.§§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693, (1993). Rigel's petition was more than two months after the period for filing petitions for reconsideration had elapsed. Because Rigel's petition for reconsideration is untimely, it will be treated as a petition for revocation.

[3] Communications Act of 1934 § 623 (a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 CFR § 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. § 76.914 (d).

[7] The Cable Act (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)) and the Commission's rules (47 C.F.R. § 76.905 (a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the system. Communications Act of 1934, § 623 (l)(1)(A), 47 U.S.C. § 543 (l)(1)(A); 47 C.F.R. § 76.905 (b)(1).

[8] Declaration dated January 21, 1994, signed by Mr. Douglas J. Feltman, President, Rigel CSSF Joint Venture. In this declaration, Mr. Feltman cites to the 1990 Census of Housing, Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Housing, General Housing Characteristics, (State of Georgia) Table 1, at 8.

[9] 47 C.F.R. § 76.906.

[10] 47 C.F.R. § 76.911(b)(1).

[11] "Housing units" are not the same as "households," the term used in the Cable Act and the Commission's rules. The count of "households" in the 1990 Census reflects only occupied housing

the number of households in the franchise area. *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994).[12] Relying on the data for occupied housing units, a comparison of the number of subscribers Rigel claims to have (179) in relation tothe number of occupied housing units yields a penetration level of 11.9 percent. Thus, we find that Rigel's cable system serving Port Wentworth, Georgia is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the petition for revocation filed by Rigel CSSF Joint Venture, challenging the certification of Port Wentworth, Georgia, to regulate Insight's basic cable rates IS GRANTED.

7. IT IS FURTHER ORDERED that the certification filed by Port Wentworth, Georgia, to regulate Rigel CSSF Joint Venture's basic cable rates IS RESCINDED.

8. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census and population, CP-1-1B, Appendix B at B-8. "Housing units" reflect occupied and unoccupied units.

[12] As the Commission noted recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994). The term "household" is defined by Census Bureau to include only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications

Apparent Liability for Forfeiture
and Order to Show Cause

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER TO SHOW CAUSE

Adopted: December 30, 1994; Released: January 4, 1995

By the Commission: Commissioner Quello concurring in part and dissenting in part.

I. INTRODUCTION

1. By this Notice of Apparent Liability for Forfeiture (NAL), we initiate enforcement action against AT&T Communications (AT&T). For the reasons we discuss below, we find that AT&T apparently violated Section 201(a) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 201(a), by failing to provide communications service under Contract Tariff F.C.C. No. 383 after receiving orders for this service from Tel-Save, Inc. (Tel-Save), Public Service Enterprises, Inc. (PSE), and GE Communications Systems, Inc. (GECCS). Based on our review of the facts and circumstances surrounding this violation, we find that AT&T is apparently liable for a forfeiture in the amount of $1,000,000. We also order AT&T to show cause why it should not be ordered to provide service to these parties under Contract Tariff No. 383.

2. Section 201(a) of the Act requires common carriers to furnish communication service upon reasonable request.[1] As an interstate common carrier, AT&T is bound by these and other provisions in Title II of the Act. PSE, Tel-Save and GECCS resell interstate telecommunication services provided to them by AT&T and thus are also common carriers.[2] The Commission has a long-standing requirement that all common carriers must permit unlimited resale of their services. The Commission has found that unlimited resale promotes the public interest by creating competitive pressures on carriers to provide service at rates near the cost of service and by stimulating demand for such service.[3] Because of these benefits from resale of communications services, the Commission has rejected restrictions on resale as unjust and unreasonable under Section 201(b), and has concluded that resale and sharing serves as a vehicle for efficient enforcement of Section 202(a) of the Act.[4]

3. In the *Interexchange Competition Order*,[5] the Commission permitted AT&T to offer contract-based rates, concluding that such offerings were consistent with Sections 202 and 203 of the Act. The Commission determined that contract tariffs are presumed lawful and are accorded streamlined review, taking effect after 14 days' notice. In considering the potential adverse effects of contract carriage on resellers, the Commission concluded that it was "not reasonable to assume that AT&T will refuse to present them [resellers] with viable service options at reasonable rates. In any event . . ., the terms of AT&T's contracts must be filed with the Commission and made available to all similarly situated customers, including resellers."[6] In this order, we address asituation in which AT&T has apparently refused to provide service under a contract tariff despite requests for this service from the resellers named above, in violation of Section 201(a) of the Act.

II. BACKGROUND

4. On August 9, 1993, AT&T filed Contract Tariff No. 383 with the Common Carrier Bureau. The tariff took effect on August 23, 1993. Tel-Save and PSE requested service under the contract tariff on August 24 and September 14, respectively. GECCS requested service not long thereafter.[7] These three customers thus sought service under Contract Tariff 383 as originally filed, with the same terms and conditions that were in effect when they first requested the service. No service under Contract Tariff 383 has been delivered to these resellers from the time that this contract tariff was introduced.

5. On September 9, 1993, after receiving the order for service from Tel-Save, AT&T filed a tariff transmittal that would have changed material terms and conditions of Contract Tariff 383.[8] By this transmittal, AT&T proposed to amend the application of certain usage credits provided under Contract Tariff 383. As originally filed, Sections 6.B.3 and 6.B.4 of Contract Tariff 383 stated:

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[1] Section 201(a) of the Act, 47 U.S.C. § 201(a). Section 201(a) of the Act states that "[i]t shall be the duty of every common carrier engaged in interstate . . . communication by wire or radio to furnish such communications service upon reasonable request therefore. . .".

[2] *See* Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 F.C.C. 2d 261 (1976) (*Resale and Shared Use Order)* amended on recon., 62 F.C.C. 2d 588 (1977) aff'd sub nom. American Telephone and Telegraph Co. v. FCC, 572 F.2d 17 (2d Cir.), cert. den. 99 S. Ct. 213(1978). Resale is "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications service and facilities to the public (with or without 'adding value') for profit." *Id.* at 271. The resale of communications service is a common carrier activity and entities engaging in resale are fully subject to the provisions of Title II of the Communications Act. *Id.* at 321.

[3] *Id.* at 283, 298-99.

[4] *Id.* at 283.

[5] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, 6 FCC Rcd 5880 (*Interexchange Competition Order), reconsidered in part,* 6 FCC Rcd 7569 (1991), *further recon.*, 7 FCC Rcd 2677 (1992).

[6] *Id.* at 5901.

[7] *See* Letter from Robert Reisner, GECCS, to Richard Higginson, Eastern Region Manager, Specialized Markets Division, AT&T (dated September 17, 1993).

[8] *See* AT&T Contract Tariff Transmittal No. 632, filed September 9, 1993.

> 3. AT&T will apply a quarterly usage credit, in an amount equal to 10% of the total of the qualifying usage charges in the previous quarter . . . To be eligible to receive this credit, the Customer must have at least $90,000 in . . . quarterly usage billing. The customer must satisfy all monitoring conditions . . . or will be liable for repayment of this credit.
>
> 4. AT&T will apply a quarterly usage credit, in an amount equal to 15% of the total qualifying usage charges in the previous quarter . . . To be eligible to receive this credit, the Customer must have at least $195,000 in . . . quarterly usage billing. The customer must satisfy all monitoring conditions specified . . . or will be liable for repayment of this credit.

Thus, under the plain language of the tariff as originally filed, a customer could qualify for both usage discounts. Even if the language were found to be ambiguous, however, it is well-established that such uncertainties in tariff provisions are interpreted in the customer's favor.[9]

AT&T proposed in the September 9 tariff transmittal to amend Sections 6.B.3 and 6.B.4 to state:

> 3. AT&T will apply a quarterly usage credit, in an amount equal to 10% of the total of the qualifying usage charges in the previous quarter . . . To be eligible to receive this credit, the Customer must have at least $90,000 in . . . quarterly usage billing. *This credit cannot be combined with the credit in 6.B.4., following.* The customer must satisfy all monitoring conditions . . . or will be liable for repayment of this credit.
>
> 4. AT&T will apply a quarterly usage credit, in an amount equal to 15% of the total qualifying usage charges in the previous quarter . . . To be eligible to receive this credit, the Customer must have at least $195,000 in . . . quarterly usage billing. *This credit cannot be combined with the credit in 6.B.3., preceding.* The customer must satisfy all monitoring conditions specified . . . or will be liable for repayment of this credit.

(emphasis added).

6. On September 13, 1993, prior to the date on which the proposed changes to Contract Tariff 383 would have taken effect,[10] AT&T sent a letter to Tel-Save accepting its request for Contract Tariff 383. In its letter, AT&T also notified Tel-Save of the pending "clarifications" that were on file with the Commission. Finally, AT&T attached a Contract Tariff Order Form, which it claimed was "necessary to execute the agreement" between AT&T and Tel-Save.[11] This document, however, had previously been completed and forwardedp to AT&T by Tel-Save as part of its initial request on August 24.[12]

7. On September 15, 1993, Tel-Save and GECCS filed petitions to reject or suspend and investigate the amendments contained in the September 9 tariff transmittal. On the same date, PSE filed a petition to reject the transmittal. The parties claimed AT&T was attempting to alter material terms of Contract Tariff 383 by means of the proposed amendments. They also claimed that their orders for Contract Tariff 383 had been received by AT&T prior to the proposed effective date of those contract amendments. Thus, these petitioners argued, AT&T should have sought their approval of any changes to the contract terms rather than attempting to change unilaterally the terms of the contract tariff. At the direction of the Common Carrier Bureau, the effective date of the revisions to Contract Tariff 383 contained in the tariff transmittal was deferred until December 8, 1993 in order to evaluate the issues raised by petitioners.

8. On November 16, 1993, AT&T filed an amendment to the tariff to "grandfather" parties ordering service under Contract Tariff 383. This amendment provided that "customers who have ordered this Contract Tariff [Contract Tariff 383] by November 16, 1993" were not subject to the amendments contained in the September 9 transmittal, but were still bound by the terms of the contract service offering as filed on August 9, 1993. Thus, the new tariff amendment allowed the petitioners to take service under Contract Tariff 383 pursuant to the terms and conditions that were in effect when AT&T accepted their requests for service. GECCS, PSE and Tel-Save withdrew their petitions against the tariff transmittal in light of AT&T's amendment.[13] Because of these developments, the Bureau granted AT&T's request to advance the effective date of the amendments to Contract Tariff 383 from December 8, 1993 to November 16, 1993.[14]

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[9] American Satellite Corporation v. MCI Telecommunications Corporation, 57 F.C.C. 2d 1165, 1167 (1976), *citing* United States v. Gulf Refining Co., 268 U.S. 542, 45 S. Ct. 597, 69 L. Ed. 1082 (1925) ("It is well settled that where there is an ambiguity, uncertainty, or reasonable doubt as to which of two constructions should prevail in a tariff schedule, the ambiguity should be resolved against the maker of the tariff and in favor of the customer."); *see also* 13 C.J.S., Carriers § 303, p. 706 13 Am. Jur., Carriers §116, p. 655 (Carriers establishing tariff schedules for interstate commerce are not entitled to have those schedules liberally construed in their own favor.)

[10] The revisions in Contract Tariff Transmittal 632 were filed to take effect on September 23, 1993 on 14 days notice.

[11] *See* Letter from Richard Higginson, Eastern Region Manager, Specialized Markets Division, AT&T, to Daniel Borislow, President, Tel-Save (dated September 13, 1993). A copy of AT&T's letter accepting Tel-Save's request for service under Contract Tariff 383 is attached to the Tel-Save petition to reject, or to suspend and investigate, AT&T Contract Tariff Transmittal No. 632, which was filed with the Commission on September 15, 1993. AT&T similarly acknowledged GECCS' request for service by letter on September 13, 1993, and PSE's request for service by letter on September 29, 1993.

[12] *See* Letter from Daniel Borislow, President, Tel-Save to Richard Higginson, Eastern Region Manager, Specialized Markets Division, AT&T (dated August 24, 1993). With its letter, Tel-Save attached a completed AT&T Contract Tariff Order Form. In its letter, Tel-Save states that it filled out the order form for Contract Tariff 383 in exactly the same way as it previously had filled out the same form when it ordered service under AT&T's Contract Tariff 190.

[13] *See* Letters to the Secretary, Federal Communications Commission (November 16, 1993.)

[14] *See* AT&T Contract Tariff Transmittal No. 952, filed November 16, 1993, revising material in Contract Tariff 383 which was originally filed under Contract Tariff Transmittal 632. As

9. As of December 1, 1994, AT&T has not furnished communications service under Contract Tariff 383 to Tel-Save, PSE and GECCS despite AT&T's acknowledgement of their requests for service.[15]

III. DISCUSSION

10. We find that AT&T has apparently violated Section 201(a) of the Act by failing to furnish communications service pursuant to Contract Tariff 383 to Tel-Save, PSE and GECCS. Tel-Save, PSE and GECCS requested service under Contract Tariff 383. Nevertheless, no service has been provided to them under Contract Tariff 383, nor has AT&T provided to them a satisfactory reason for its delay in providing this service. Under the circumstances we have described here, AT&T's failure to provide the requested communications service constitutes an apparent breach of its common carrier obligation to provide a tariffed service upon reasonable request as set forth in Section 201(a) of the Act.

11. The Commission has routinely required common carriers to meet their Section 201(a) obligations to furnish communications service when so requested. In imposing a forfeiture for a violation of Section 201(a), the Commission has stated:

> we expect that carriers who are requested to provide service should make all efforts to do so, such as providing them under protest pending the resolution of complaints, petitions, or litigation, rather than refusing to meet a questionable obligation until after the complaint or litigation is resolved. Those who choose the course of non-compliance are on notice that they will be acting at their own peril, should the question of the legitimacy of their refusal to meet the common carrier obligations be decided against them.[16]

This admonition is particularly relevant when an important Commission policy (our resale requirements) is thwarted by a carrier's refusal to provide service.

12. We have concluded that AT&T's failure to provide service under Contract Tariff 383 to these resellers is an apparent violation of Section 201(a) of the Communications Act. AT&T's actions are of significant concern to us because they appear to be an intentional attempt to vitiate the goals of the Commission's resale policy. In the *Resale and Shared Use Order*, we determined that unlimited resale of communications services in a competitive environment is just and reasonable, and that tariff provisions preventing or restricting such practices are unjust and unreasonable and thus unlawful under Section 201(b) of the Communications Act. The Commission found that numerous public benefits would flow from unlimited resale and sharing activity, which in part "entails elimination of underlying carrier tariff restrictions on resale and sharing."[17] Chief among the public benefits from unlimited resale is the incentive provided to carriers to offer services at rates that more closely reflect the underlying cost of providing the service. If a carrier's communications services and facilities can be resold, it is more likely to price them closer to costs.[18] Further, because unrestricted resale and sharing of communications services will increase the number of parties offering the same types of services, undue discrimination in the marketplace is less likely to occur. Thus, the resale mechanism furthers the objectives of Sections 201(b) and 202(a) of the Act.[19]

13. Actions taken by a carrier that effectively obstruct the Commission's resale requirements are inherently suspect. AT&T's failure to provide service under Contract Tariff 383 to resellers in response to their orders, and its attempts to use the tariff process to alter material terms of the service to the detriment of resellers after AT&T had received service orders, leads us to conclude that AT&T has apparently sought to evade the Commission sresale policy. The three resellers identified above relied on the general availability of Contract Tariff 383 by ordering service within days of the tariff's effective date. After acknowledging the resellers' orders for service, however, AT&T attempted to change the discounts that were available under the terms of the contract tariff. AT&T's actions in attempting to amend material terms of the contract tariff after Tel-Save's order had been submitted appear to support an inference that AT&T intentionally sought to prevent these resellers from obtaining the full benefits of the contract tariff that were originally offered. Additional evidence of such apparent intent can be found in AT&T's lengthy inaction in response to the parties' timely request for service. Further, despite its receipt of Tel-Save's request for service, AT&T's cover letter accompanying the proposed amendments stated only that the "existing Customer for the Contract Tariff is aware of and has agreed to this change." Although only one entity had been receiving service under Contract Tariff 383, more than one party had expressed interest in receiving service under the existing terms of the contract tariff

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discussed above at note 7, Contract Tariff Transmittal 632 proposed to amend language pertaining to certain usage credits. By Contract Tariff Transmittal 952, AT&T also sought to advance the effective date of the material filed in Contract Tariff Transmittal 632 from December 8, 1993 to November 16, 1993.

[15] Tel-Save terminated its request for Contract Tariff No. 383 in late June, 1994 as part of a larger settlement agreement with AT&T. This was more than ten months after it ordered service, and more than nine months after AT&T accepted Tel-Save's order. Like PSE and GECCS, Tel-Save never received service under Contract Tariff 383.

[16] In the Matter of Hawaiian Telephone Company, 78 F.C.C. 2d 1062, 1065 (1980); *see also* Cable News Network, Inc., et. al., 78 F.C.C. 2d 1200A, 1204 (1980)(Carrier liable for forfeiture for failing to provide circuits pursuant to order of the Chief, Common Carrier Bureau in violation of Section 201(a): "...a carrier is obligated to take reasonable steps to meet a demand for service..."); Ward v. Northern Ohio Telephone Company, 300 F.2d 816h)(6th Cir. 1962), cert. den.371 U.S. 820 (1962) (Carrier liable for damages to radio station operator when it stopped providing telephone lines to carry radio broadcasts from the source of the broadcast to the transmitter).

[17] *Resale and Shared Use Order*, 60 F.C.C. 2d at 298.

[18] *Resale and Shared Use Order*, 60 F.C.C. 2d at 299. *See also* Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873 (1989)(*AT&T Price Cap Order); modified on recon.*, 6 FCC Rcd 665 (1990); Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990) (*LEC Price Cap Order)*, Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), *modified on recon.*, 6 FCC Rcd 2637 (1991), *aff'd*, National Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

[19] *Resale and Shared Use Order*, 60 F.C.C. 2d at 298-99.

when AT&T proposed to amend the tariff. By its letter, however, AT&T implied to the Bureau that the only party desiring service under Contract Tariff 383 had agreed to the amendments AT&T proposed.

14. Most importantly, however, AT&T still has not actually provided service to these resellers under Contract Tariff 383. The failure to provide service serves as the basis for our finding of an apparent violation of Section 201(a). The evidence of AT&T's apparent intent to evade the Commission's resale requirements further buttresses the essential finding of an apparent statutory violation warranting a proposed forfeiture.

15. Our authority to assess forfeitures for the apparent violations of Section 201 of the Act and related Commission rules, regulations, and orders is governed by Section 503 of the Act.[20] The forfeiture ceiling per day for a continuing violation set forth in Section 503 is $100,000 for common carriers, with an overall limit of $1,000,000 for continuing violations involving a single act or failure to act. We find that AT&T's failure to furnish communications service under Contract Tariff 383 to each of these resellers is a willful, continuing violation of Section 201(a) of the Act of a duration exceeding at least ten days, thus implicating the statutory maximum.[21] Forfeiture amounts for violations of Section 201(a) are not specified in the Act. Because of the apparently intentional nature of AT&T's violation and the fact that the violation was repeated with three separate entities and continued for some time, we believe a forfeiture of the statutory maximum amount of $1,000,000 is warranted consistent with factors set forth in Section 503(b)(2)(D) of the Act.

16. We also order AT&T to show cause why it should not be required to bring itself into compliance with Section 201(a) by remedying its failure to provide service to PSE and GECCS.[22]

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 C.F.R. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that AT&T Communications IS HEREBY NOTIFIED of an Apparent Liability for Forfeiture in the amount of $1,000,000 for its continuing violation of Section 201(a) of the Communications Act, 47 U.S.C. § 201(a) by failing to furnish communication service upon the reasonable request of Tel-Save, Inc., Public Service Enterprises, Inc., and GE Communications Systems, Inc.

18. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), that AT&T Communications SHALL PAY within thirty (30) days of the release of this notice the full amount of the forfeiture ordered here in the manner provided for in Section 1.80(h) of the Rules[23] or SHALL FILE a response showing why a forfeiture should not be imposed or should be reduced.

19. IT IS FURTHER ORDERED that AT&T shall show cause why it should not be required to furnish service to Public Service Enterprises, Inc. and GE Communications Systems, Inc., under the terms and conditions of AT&T Contract Tariff F.C.C. No. 383 within thirty (30) days of the release of this Order.

20. IT IS FURTHER ORDERED that copies of this Notice of Apparent Liability for Forfeiture and Order to Show Cause SHALL BE SENT by certified mail to AT&T's counsel, Francine J. Berry, Esq., AT&T Communications, Room 3244J1, 295 North Maple Avenue, Basking Ridge, NJ 07920.

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[20] *See* Section 503(b)(1)(B) of the Communications Act, 47 U.S.C. § 503(b). Section 503(b) of the Communications Act states in pertinent part that "Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this sub-section, to have--

> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter... shall be liable to the United States for a forfeiture penalty.

[21] Section 312(f)(1) of the Communications Act provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Communications Act. *See Southern California Broadcasting Co .*, 6 FCC Rcd 4387 (1991) ([W]illful means that the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the law.)

Section 312(f)(2) of the Communications Act provides:

> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition applies to Section 503(b) as well. *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 50-51 (1982).

[22] Under the circumstances, we do not believe it is necessary to specify the exact date on which AT&T's failure to provide service under Contract Tariff 383 became a violation of Section 201(a). Given the long delay since AT&T received the Tel-Save, PSE and GECCS orders, we need only to conclude that AT&T's failure to provide service upon reasonable request became apparent, at the latest, by a date six months after the date of the first order filed by any one of the three resellers, that is, by February 24, 1994, the date Tel-Save placed its order for service under Contract Tariff 383.

[23] The forfeiture amount should be paid by check or money order drawn to the order of the Federal Communications Commission. Reference should be made on AT&T Communications' check or money order to "NAL/Acct. No. 517TF0001." Remittances should be mailed to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, IL 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

WT Docket No. 95-11

In the Matter of the Application of

HERBERT L. SCHOENBOHM
Kingshill, Virgin Islands

For Amateur Station
and Operator Licenses

AMENDED HEARING DESIGNATION ORDER[1]

Adopted: February 6, 1995; Released: February 15, 1995

1. Mr. Herbert L. Schoenbohm has applied for renewal of his amateur service station and operator licenses. For the reasons stated below, his application will be designated for a hearing to determine whether the application shall be granted.

2. In *Government v. Schoenbohm*, No. Crim: 1991/0108 (D.V.I. Dec. 30, 1992), Mr. Schoenbohm was convicted in the U.S. District Court for the District of the Virgin Islands (District Court) of violating 18 U.S.C. § 1029(a)(1) (fraudulent use of counterfeit access device).[2] The District Court sentenced Mr. Schoenbohm to imprisonment for a term of two months. The District Court suspended execution of this sentence and placed Mr. Schoenbohm under house arrest for two months with two years probation. The District Court also required Mr. Schoenbohm to pay a fine of $5,000 during the probation period. Mr. Schoenbohm started serving his sentence on January 11, 1993.

3. On appeal, the U.S. Court of Appeals for the Third Circuit affirmed Mr. Schoenbohm's conviction. *United States V. Schoenbohm*, No. 93-7516 (Third Circuit July 22, 1994). On November 2, 1994, the U.S. Court of Appeals for the Third Circuit denied Mr. Schoenbohm's petition for a rehearing. *United States V. Schoenbohm*, No. 93-7516 (Third Circuit November 2, 1994).

4. In view of the criminal conviction described above, it appears that Mr. Schoenbohm lacks the requisite qualifications for a renewal of his amateur service license. Certainly, his conviction for fraudulently using a counterfeit access device (to obtain long distance telephone service) is relevant to evaluating the likelihood that he will comply with the Commission's Rules as a licensee in the amateur service. *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1183 (1986), *recon.*, 1 FCC Rcd 421, 424 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987), *as modified*, 5 FCC Rcd 3252, 3253 (1990) [to cover nonbroadcast licensees], *recon.*, 6 FCC Rcd 3448 (1991).

5. IT IS ORDERED, under Section 309(e) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 309(e), that the application of Herbert L. Schoenbohm to renew his amateur station and operator licenses IS DESIGNATED FOR HEARING before an Administrative Law Judge and at a time and location determined by the order of the Chief Administrative Law Judge released on February 2, 1995; and that the issues thereupon will be the following:

(a) To determine whether, in light of the conviction described above, Herbert L. Schoenbohm is qualified to renew his amateur service licenses.

(b) To determine, in light of the foregoing issue, whether granting Herbert L. Schoenbohm's application would serve the public interest, convenience and necessity.

6. IT IS FURTHER ORDERED that, under Section 309(e) of the Act, 47 USC § 309(e), the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant as to all issues.

7. IT IS FURTHER ORDERED that a copy of this Order shall be sent to the applicant by Certified Mail -- Return Receipt Requested -- and that, to avail himself of the right to an administrative hearing, the applicant must file a notice of appearance with the Commission's Secretary no later than 20 days after the release of this order.[3]

FEDERAL COMMUNICATIONS COMMISSION

Myron C. Peck
Deputy Chief, Enforcement Division
Wireless Telecommunications Bureau

[1] This order supersedes the Hearing Designation Order released January 30, 1995.

[2] Section 1029 provides, in pertinent part, that whoever "knowingly and with intent to defraud uses one or more counterfeit access devices . . . shall, if the offense occurs in interstate or foreign commerce, be punished as provided . . . ." It defines an "access device" as "any plate, card, code, account number, or other means of access that can be used . . . to obtain money, goods, services or any other thing of value . . . ."

[3] The enclosed form may be used for this purpose.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Seeway Broadcasters against Continental Cablevision of Ohio, Inc	CSR-4213-M OH0030

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 1995; Released: February 16, 1995

By the Cable Services Bureau:

INTRODUCTION

1. On January 31, 1994, Seeway Broadcasters ["Seeway"], licensee of low power television station W21BF (Channel 21), Fremont, Ohio, filed the captioned petition requesting mandatory carriage of its signal on the cable system operated by Continental Cablevision of Ohio, Inc. ["Continental"], serving Bellevue, Clyde, Green Creek Township, Green Springs, Vickery, York Township, and parts of Groton Township, Ohio. The petition was placed on public notice on February 25, 1994.[1] Continental opposed Seeway's complaint on March 17, 1994, and Seeway replied on March 22, 1994.

SUMMARY OF PLEADINGS

2. In support of its complaint, Seeway argues that it meets all of the applicable requirements for mandatory carriage of the station.[2] Seeway states that W21BF is a 24-hour-per-day low power television [LPTV] station, and that it adheres to the Commission's nonentertainment programming and employment requirements. Seeway states that it provides programming that addresses local news and informational needs which are not being adequately served by distant full power stations. Seeway further states that W21BF is located within 35 miles of Continental's principal headend, and that it complies with the Commission's rules governing interference. Seeway states that Fremont, W21BF's community of license, has a population of less than 35,000 and that Fremont is located outside of the 160 largest Metropolitan Statistical Areas. Seeway notes that there are no full power television stations licensed to the communities served by Continental's system. Seeway contends that it formally notified Continental that it was electing mandatory carriage on November 1, 1993, and that Continental never responded to the request.

3. In opposition to Seeway, Continental notes that one of the communities served by its system---Groton Township---is located within Erie County, as is the city of license of Station WGGN-TV (Ind., Channel 52), Sandusky, Ohio. Accordingly, Continental argues that there is a full power television broadcast station licensed within a county served by Continental's system. Continental also argues that W21BF's programming does not sufficiently address the local news and informational needs of Continental's subscribers. Continental maintains that its subscribers' informational needs are adequately served by full power broadcast stations that place Grade B contours over the system.[3] In addition, Continental asserts that its public access channel carries programming of local significance. Continental also argues that W21BF fails to satisfy its children's programming requirement. Finally, Continental asserts that the signal quality of W21BF is of borderline acceptability.

4. In reply, Seeway maintains that W21BF should not be disqualified for mandatory carriage because there is a full power station located in one county---Erie County---in which Continental serves only 27 subscribers, whereas Continental serves a majority of its subscribers in Huron, Sandusky, and Seneca Counties, and has its headend in Sandusky County. In addition, Seeway disputes Continental's contention that the informational needs of its subscribers are adequately served by full power stations "located approximately 35 miles from the communities the system serves," or by Continental's public access channel. Seeway states that W21BF provides local newscasts on weekdays providing several stories of interest pertaining to one or more of the communities served by Continental's system. Seeway reiterates that it provides children's programming as required by the Commission's Rules, and submits an affidavit to this effect from David Gorman, Executive Vice President and Director of Operations for MSTV, Inc., which provides children's programming to W21BF. Finally, Seeway notes that Continental provides no evidence of poor signal quality, despite Continental's claim that the station's signal is "borderline."

DISCUSSION

5. Both the Communications Act of 1934, as amended, and the Commission's rules requires the carriage of "qualified" LPTV stations in certain limited circumstances.[4] An LPTV station that conforms to the rules established for LPTV stations in Part 74 of the Commission's Rules will be considered "qualified" only if: 1) it broadcasts for at least the minimum number of hours of operation required under 47 C.F.R. Part 73; 2) it adheres to Commission requirements regarding nonentertainment programming and employment practices and the Commission determines that the programming by the LPTV station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of geographic distance of such full power stations from the low power station's community of license; 3) it complies with interference regulations consistent with its secondary status; 4) it is located no more than 35 miles

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[1] *Cable Television Service Registrations Report No. 981* (released February 25, 1994).

[2] *See* 47 U.S.C. §534(h)(2).

[3] Continental submits a declaration from Gary J. Albers, Promotion Director of Station WTOL-TV (CBS, Channel 11), Toledo, Ohio, asserting that the station broadcasts news stories of interest to Continental's subscribers.

[4] 47 U.S.C. §534(c)(1); 47 C.F.R. §76.56(b)(3).

from the cable system's headend and delivers to the principal headend an over-the-air signal of good quality; 5) the community of license of the station and the franchise area of the cable system are both located outside the largest 160 Metropolitan Statistical Areas on June 30, 1990, and the population of such community of license on that date did not exceed 35,000; and 6) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system.[5]

6. We shall grant Seeway's petition. Continental's arguments are not persuasive. Continental concedes that it receives an adequate signal, however "borderline," from W21BF, and provides no engineering data to the contrary. Though Continental claims that Seeway has not presented evidence to demonstrate that it meets its children's programming responsibilities, Continental's' undocumented assertion is not a sufficient rebuttal to Seeway's presentment that it complies with the children's programming requirements.[6] While Continental submits a declaration from the Promotion Director of WTOL-TV asserting that the station broadcasts news stories of interest to Continental's subscribers, referencing "one or more of the communities served by Continental's . . . system," as well as news stories of "regional" interest, this general assertion is not sufficient to warrant a finding by this Commission that W21BF is not meeting its local programming responsibilities.

7. Finally, Continental's argument that W21BF is not qualified for must-carry status throughout Continental's system because there is a full power television broadcast station licensed within a county served by one portion of Continental's system is not persuasive. The Commission specifically addressed this question in adopting the implementing rules for the mandatory signal carriage requirements of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"].[7] In response to a suggestion from Comcast Corporation that the language in the 1992 Cable Act

> should be interpreted to mean that where a cable system serves *any* community to which one or more full power stations are licensed, an LPTV station will not qualify for carriage on the system. Similarly, Section 614(h)(2)(E) refers to a single franchise area, but according to Comcast it should be interpreted to refer to all franchise areas served by a single system. We believe, contrary to Comcast's assertion, the correct interpretation is that, if a full power station is located in the same county or political subdivision (of a State) as an otherwise "qualified" LPTV station, the LPTV station will not be eligible for must-carry status.[8]

W21BF's city of license---Fremont, Ohio---is located in Sandusky County. No full power station is licensed to a community in Sandusky County, Ohio.[9] Accordingly, Seeway has demonstrated W21BF's right to mandatory carriage on Continental's system.

8. In view of the foregoing, we find that grant of Seeway's petition is in the public interest.

ORDER

9. Accordingly, IT IS ORDERED, That the complaint (CSR-4213-M) filed January 31, 1994 by Seeway Broadcasters against Continental Cablevision of Ohio, Inc. IS GRANTED, in accordance with §614(d)(3) of the Communications Act of 1934, as amended [47 U.S.C. §534(d)(3)].

10. IT IS FURTHER ORDERED, That Continental Cablevision of Ohio, Inc. SHALL COMMENCE CARRIAGE of the signal of W21BF forty-five (45) days from the release date of this *Order* on Continental's cable system serving Bellevue, Clyde, Green Creek Township, Green Springs, Groton Township, Vickery, and York Township, Ohio.

11. These actions are taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Service Bureau

[5] 47 U.S.C. §534(h)(2); 47 C.F.R. §76.55(d).

[6] In any event, we note that Seeway has submitted in its reply an affidavit from its supplier of children's programming.

[7] Pub. L. No. 102-385, 106 Stat. 1460 (1992). *See Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965, 2983 n.211 (1993).

[8] *MM Docket No. 92-259, supra* (emphasis added).

[9] The only community served by Continental located within a county to which a full power television broadcast station is licensed is Groton Township in Erie County, in which the city of Sandusky, Ohio is situated, to which Station WGGN-TV is licensed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Family Stations, Inc., against Sonic Cable Television	CSR-4274-M
Request for Carriage	

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 1995; Released: February 16, 1995

By Cable Services Bureau:

INTRODUCTION

1. On June 28, 1994, a petition on behalf of Family Stations, Inc., licensee of station KFTL(TV) (Ch. 64), Stockton, California, was filed with the Commission claiming that Sonic Cable Television of Northern California, ("Sonic"), operator of cable television systems serving Loyalton, Portola, Graeagle and Greenville, California, had declined to carry the station's signal, even though KFTL(TV) is a "local" signal within the meaning of §4 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat 1460 (1992). On August 1, 1994, Sonic filed an opposition to this petition to which Family Station replied on August 16, 1994.

SUMMARY OF PLEADINGS

2. In support of its petition, KFTL states that in a letter dated August 13, 1994, it notified Sonic of its obligations under the Commission's Rules to carry home shopping stations such as KFTL(TV) and requested a description of the reception and over-the-air signal processing equipment used if Sonic determined that a signal quality problem existed. KFTL further states that in a letter dated December 1, 1993, it notified Sonic that KFTL(TV) was not being carried on Sonic's cable systems pursuant to its representations. In addition, KFTL states that in a letter dated April 22, 1994, it questioned the appropriateness of Sonic's designated principal headends, disputed Sonic's methodology for testing the station's signal strength, requested signal strength testing at Sonic's microwave transmit station, Mills Peak, and requested the expeditious carriage of the station. According to KFTL, Sonic did not reply to the must-carry request.

3. KFTL contends that although Sonic's system has multiple headends, only its Mills Peak facility may be designated the principal headend for the purpose of determining signal strength levels. According to the station, Sonic's designated principal headends are not capable of receiving over-the-air signals. As a result, KFTL questions whether Sonic's choice of Mills Peak as its principal headend may have been motivated to circumvent its must-carry obligations. It also argues that Sonic's signal quality testing methodology does not comply with the Commission's Rules. Specifically, it argues that good engineering practices dictate that signal quality measurements should have been taken at the Mills Peak facility because it is located at a significantly higher elevation than Sonic's designated principal headends.

4. In its opposition, Sonic contends that KFTL is not entitled to mandatory carriage because it fails to deliver a good quality signal to Sonic's principal headends. Sonic maintains that it tested station KFTL(TV)'s signal strength twice and determined that no signals were received at its headends. Sonic also maintains that it was appropriate and consistent with good engineering practices for it to take signal measurements from its designated headends rather than from the Mills Peak site. According to Sonic, its cable systems serving Loyalton, Portola, Graeagle, and Crescent Mills are operated as four technically separate systems. Sonic argues that its designation of principal headends in Loyalton, Portola, Graeagle, and Crescent Mills is consistent with the Commission's guidelines established in *Report and Order*, MM Docket 92-259, 8 FCC Rcd 2965, 2968 (1993). Sonic further argues that these headends provide cable service directly to subscribers and receive and process over-the-air signals as well as satellite and microwave transmissions. Sonic asserts that unlike the Mills Peak facility, the principal headends are located near the communities they serve. Sonic contends that it is not required to incur the substantial cost for specialized antenna and equipment needed to receive a weak UHF signal at Mills Peak and to microwave the signal to its designated principal headends. Sonic disputes KFTL's contention that it is attempting to avoid its must-carry obligations.

5. In addition, Sonic argues that the must-carry rules violate the First Amendment of the Constitution. Sonic contends that mandatory carriage would not preserve any benefit of local broadcast television stations because station KFTL(TV) is licensed to a community approximately 150 miles from Sonic's cable systems. As a result, Sonic maintains that station KFTL(TV) can not be described as a local station. Sonic also contends that carriage of KFTL(TV) would merely duplicate existing program offerings rather than promote the dissemination of information from a multiplicity of sources.

6. In reply, although KFTL concedes that Sonic properly designated its principal headends, the station argues that Sonic's signal quality measurement methodology does not comply with the Commission's Rules. Specifically, KFTL argues that good engineering practices mandates the testing of its signal strength from the Mills Peak facility. KFTL denies Sonic's claim that it would incur substantial costs to conduct signal quality measurements at the Mills Peak facility. KFTL indicates that it is willing to conduct joint signal quality tests using a specialized antenna and any other equipment necessary to receive a good quality signal off-the-air. In addition, KFTL maintains that the cost to Sonic of transmitting signals via microwave to the designated headends is properly treated as a routine cost of receiving signals from the Sacramento part of the ADI. Finally, KFTL argues that Sonic's First Amendment claim is unfounded because the Supreme Court has not yet declared the must-carry rules unconstitutional. KFTL states that carriage of the station would not duplicate programming and argues that it maintains a studio located as close or closer to the systems in question than the studios of the Sacramento market stations carried by Sonic.

DISCUSSION

7. We are persuaded by Sonic that it made a proper designation of its principal headends. As the Commission stated in the *Must Carry Order* in MM Docket 92-259, 8 FCC Rcd 2965, 2968 (1993), "the 'principal' headend in the majority of systems will be the headend serving the most subscribers, accommodating the most signal processing equipment, or lying closest to the geographical center of the system." The designated principal headends picked by Sonic receive off-air signals, operate as independent systems apart from a microwave interconnect, and separate signal processing equipment is located in each of the designated principal headends. In addition, the headends are located very close to the communities they serve. In light of these factors, KFTL concedes that the Loyalton, Graeagle, Greenville, and Crescent Mills headend facilities have been properly designated as principal headends.

8. Nevertheless, KFTL's argues that good engineering practices require that Sonic "take into account the elevation of the Mills Peak facility and its distance from the designated headends when signal quality measurements are taken."[1] The Commission has clarified that if signal quality "measurements were made at a designated headend that is not the current reception location(headend) for the broadcast signals, we expect the cable operator to follow good engineering practices for the measurement of the broadcast signals in question."[2] KFTL misinterprets this standard. The Commission's rules do not require Sonic to measure station KFTL(TV)'s signal at a nonprincipal headend even if the subject signal is currently received there. Also we note that the Mill's Creek facility and the Crescent Mills mountain top facility serve the Loyalton, Portola, and Graeagle principal headends via microwave. Cable operators are not required by the Commission's rules to transport a station's signal to a cable system's headend in this manner.[3]

9. Accordingly, the petition filed by June 28, 1994 by Family Stations, Inc. (CSR-4274-M) IS DENIED pursuant to §614 (47 U.S.C. §534) of the Communications Act of 1934, as amended.

10. This action is taken by the Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[1] The entire thrust of KFTL's argument is that the measurements in question must be taken at the Mills Peak facility. However, it also suggests in a footnote to its reply pleading that Sonic misidentified the specific frequency measured. We do not believe it necessary to require that this filing be corrected or additional measurements be taken since, as KFTL concedes, the headends designated by Sonic and the station's transmitter are separated by as much as 150 miles of rough terrain (the Sierra Nevada range with peaks at approximately 8-10,000 feet are in the intervening area according to KFTL) and it would be "physically impossible" to receive the Sacramento area stations at the headends designated by Sonic. Reply to Opposition at note 8.

[2] *Clarification Order* in MM Docket No. 92-259, 8 FCC Rcd 4142, 4143 (1993).

[3] In light of our decision herein, we need not address Sonic's First Amendment argument. However, we note that the constitutionality of the must-carry provisions of the 1992 Cable Act were challenged before the Supreme Court which has remanded the case to the District Court for the District of Columbia. As we indicated in *Memorandum Opinion and Order* in MM Docket 92-259, 9 FCC Rcd 6723 at para. 2 (1994), while that case is pending, the must-carry provisions of the 1992 Cable Act remain in effect, as do the Commission's implementing rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-56

In re Applications of

CHESTNUT LIMITED LIABILITY COMPANY[1] File No. BRH-900604YE

For Renewal of License of Station KBER-FM, Ogden, Utah

CHESTNUT LIMITED LIABILITY COMPANY (Assignor) File No. BALH-941110GH

and

RADIOWEST COMMUNICATIONS, L.P. (Assignee)

For Consent to Assignment of License of Station KBER-FM, Ogden, Utah

MEMORANDUM OPINION AND ORDER

Adopted: February 8, 1995; Released: February 16, 1995

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority,[2] has before it: (a) a Petition for Distress Sale Relief, filed on November 10, 1994, by Chestnut Broadcasting, Inc. "(CBI"); (b) an Application on FCC Form 314 for Consent to the Assignment of License of Station KBER-FM, Ogden, Utah, from CBI to Radiowest Communications, L.P. ("Radiowest"), also filed on November 10, 1994; and (c) amendments to the above referenced application, filed on January 10 and 25, 1995.[3]

2. The current licensee of KBER-FM, CLLC, seeks to avoid a hearing in this proceeding by availing itself of the Commission's minority distress sale policy and assigning the license for KBER-FM to Radiowest. See *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978) ("*Minority Distress Sale Policy*"). For the reasons that follow, we will grant the requested relief.

3. By *Hearing Designation Order and Notice of Forfeiture*, 8 FCC Rcd 2493 (1993), the Commission designated for hearing the applications of C. Devine Media, Inc. ("Devine"), for renewal of license of KBER-FM, and of Street Stryder ("Stryder"), for renewal of license of KQOL-FM, Spanish Fork, Utah. The Commission specified the following issues:

> (a) to determine whether Devine and Stryder violated Section 73.3555(a)(2) of the Commission's Rules by engaging in a sham assignment of the license of Station KQOL-FM, Spanish Fork, Utah, from Devine to Stryder;
>
> (b) To determine whether Stryder violated Section 73.3540 of the Commission's Rules and Section 310 (d) of the Communications Act by engaging in an unauthorized assignment of the license of Station KQOL-FM to Steve Evans, the brother-in-law of Chris Devine, one of the principals of C. Devine Media, Inc.,
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> (c) To determine whether Devine and Stryder violated Sections 73.1015 and 1.17 of the Commission's Rules by making misrepresentations to the Commission concerning the foregoing;
>
> (d) To determine, in light of the evidence adduced under the foregoing issues, whether Devine and Stryder possess the requisite qualifications to warrant the grant of the applications for renewal of the licenses of Stations KBER-FM and KQOL-FM.

4. It is the Commission's general policy not to permit the assignment of station licenses in cases, like the instant one, where issues involving the basic character qualifications of the licensee have been specified and remain unresolved. *Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964). In *Minority Distress Sale Policy*, however, the Commission established an exception to its general policy to allow distress sales to qualified minorities. In order to qualify for distress sale relief, an applicant must satisfy three requirements: (a) the hearing must not have yet commenced; (b) the proposed assignee must be minority controlled; and (c) the station to be conveyed must be sold at no more than 75% of its fair market value. *Lee Broadcasting Corp.*, 76 FCC 2d 462 (1980); *Clarification of Distress Sale Policy*, 44 RR 2d 479 (1978). Additionally, the buyer and seller are each required to submit an appraisal of the fair market value of the station. *Lee Broadcasting Corp.*, 76 FCC 2d 462 (1980).

5. In the instant case, the parties appear to have satisfied all of the requirements for relief pursuant to the Commission's *Minority Distress Sale Policy*. First, the hearing has

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[1] The licensee was formerly Chestnut Broadcasting, Inc., which, in turn, was formerly C. Devine Media, Inc.

[2] See *Faith Center, Inc.*, 54 RR 2d 1286, 1287 n.11 (1983); *Minority Ownership in Broadcasting*, 92 FCC 2d 849, 859 (1982).

[3] The captioned FCC Form 314 application proposing the assignment of license to Radiowest originally identified the licensee/assignor as CBI. However, subsequent to the filing of the FCC Form 314, CBI filed an application on FCC Form 316 (File No. BALH-941219GM) requesting, for tax-related purposes, authority for consent to the assignment of license of KBER-FM from CBI to Chestnut Limited Liability Company ("CLLC"), a holding company with an ownership structure identical to CBI. The Commission granted the FCC Form 316 application on December 30, 1994, and the transaction was consummated that same day. The first of the two amendments seeks to conform the pending FCC Form 314 application and related documents to reflect that the licensee/assignor of KBER-FM has been changed to CLLC.

not yet commenced. Second, Radiowest, the proposed assignee, is minority controlled. Radiowest is a limited partnership. C. Harris, Inc. a Utah corporation, is the general partner with a 26% equity interest in Radiowest. Curtis Harris ("Harris"), an African-American, owns 80% of the voting stock in C. Harris, Inc. Since Harris controls C. Harris, Inc., which in turn is Radiowest's general partner, Radiowest qualifies as a minority-controlled entity under the *Minority Distress Sale Policy*. Finally, as discussed more fully below, the parties have adequately demonstrated that the proposed sale price for KBER-FM does not exceed 75% of the station's appraised fair market value.

6. The parties have submitted three appraisals of the stations. One appraisal, by Star Media Group, Inc., places the station's fair market value at $2,260,702, as of April 1993, when the station license was designated for hearing. A second appraisal, by William R. Rice Co., places KBER-FM's April 1993 value at $2,150,000. Because the difference between the two appraisals is more than 5% of the average of the two appraisals, the parties have submitted a third appraisal. The third appraisal, by Norman Fisher & Associates, Inc., places the fair market value of the station as of April 1993 at $2,202,875. The average of the three appraisals -- and, thus, the fair market value of the station for distress sale purposes -- is $2,204,526. Since the proposed sale price for KBER-FM is $1,650,000, and this amount is less than 75% of the fair market value of the station (0.75 x $2,204,526 = $1,653,394), the proposed sale price satisfies the requirements for distress sale relief. *Patrick Henry*, 79 FCC 2d 393, 395 (1980), *clarifying Grayson Enterprises, Inc.*, 77 FCC 2d 156, 163-64 (1980).

7. The parties have represented that all facts and circumstances regarding the distress sale, including negotiations relating thereto and the consideration to be exchanged, have been disclosed. Furthermore, the assignment application and related documents have been processed, and the assignee, Radiowest, has been found to be basically qualified to be a Commission licensee.

8. ACCORDINGLY, IT IS ORDERED, that the Petition for Distress Sale Relief IS GRANTED.

9. IT IS FURTHER ORDERED, that the Application for Consent to the Assignment of License of Station KBER-FM, Ogden, Utah, to Radiowest Communications, L.P., as amended, IS GRANTED.

10. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED, provided, that if the pending assignment to Radiowest Communications, L.P. is not consummated within 90 days of the date of this *Memorandum Opinion and Order*, the action taken herein shall be void, and the renewal application for KBER-FM shall be returned to hearing status.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 16, 1995

BELLSOUTH, SOUTHWESTERN BELL AND THE UNITED STATES TELEPHONE ASSOCIATION FILE PETITIONS FOR RECONSIDERATION OF COMMON CARRIER BUREAU ORDER APPROVING CITIZENS UTILITIES' COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

On January 26, 1995, BellSouth Telecommunications, Inc. Southwestern Bell Telephone Company and the United States Telephone Association filed petitions for reconsideration of a Common Carrier Bureau (Bureau) Order released December 27, 1994 (DA 94-1499). In that Order the Bureau approved the initial Cost Allocation Manual of Citizens Utilities Company. The parties request that the Commission reconsider paragraph 11 of the Order which addresses affiliate transactions. The Order states that the terms of affiliate transctions in which the telephone company provides nonregulated services to its affiliated companies must comply with the Commission's affiliate transaction rules. The parties contend that the order misstates the applicability of the Commission's rules.

In its petition, BellSouth Telecommunications, Inc. also requests that the Commission reconsider Paragraph 36 of the Order which requires that uncollectible revenues associated with nonregulated activities be recorded in the uncollectible revenue accounts instead of the nonregulated revenue account.

Parties may file comments on the petitions no later than **March 22, 1995**. Replies should be filed by **April 7, 1995**. Comments should reference file number AAD 94-6. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202)857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan at (202) 418-0810.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Participation by COMSAT Corporation in a New Inmarsat Satellite System Designed to Provide Service to Handheld Communications Devices	File No. ISP-95-003

ORDER

Adopted: February 13, 1995; Released: February 17, 1995

By the Chief, International Bureau:

1. Pending before the Commission is a "Motion for Clarification" filed by Motorola Satellite Communications, Inc.[1] In this motion, Motorola seeks clarification of our January 10, 1995 order denying an "Emergency Motion for Temporary Relief" by TRW.[2] We deny Motorola's motion on the ground that no clarification is needed.

2. At bottom, Motorola's current motion, like our *January 10 Order*, concerns a proposed mobile satellite service known as Inmarsat-P.[3] Inmarsat-P would provide voice, facsimile, anddata service not only to Inmarsat's traditional maritime subscriber base, but to international business travelers, small aircraft, and "quasi-fixed" commercial, industrial, and governmental users in remote areas. The service is expected to be provided not by Inmarsat itself, but by a private corporation affiliated in various ways with Inmarsat, COMSAT, and other Inmarsat Signatories. Our *January 10 Order* rejected TRW's request that we prevent, or impose certain conditions on, COMSAT's investment in this Inmarsat-P "Affiliate."

3. Despite our denial of TRW's request, however, our *January 10 Order* acknowledged some uncertainty about "whether the Commission's duty to oversee COMSAT participation in the Affiliate is coextensive with its duty to oversee COMSAT participation in Inmarsat."[4] To settle this question, we directed COMSAT, as an interim matter, "to apply for Commission authorization prior to any decision by the Affiliate to procure facilities that will be used to provide Inmarsat services."[5] We required the first such application to be filed "at least sixty days before the Affiliate's Board of Directors makes any final decision to procure the facilities in question, and in any event not later than May 1, 1995."[6] We then stated,

> In addition to the information normally included in COMSAT's procurement applications, COMSAT shall include the organic documents of the Affiliate, an analysis of the extent to which the Affiliate's facilities decisions affect Inmarsat ratepayers, a demonstration of the Affiliate's structural compliance with the *Inmarsat-P Declaratory Ruling*, and an outline of the extent to which the Affiliate is or should be subject to Commission oversight beyond that for which the Communications Act provides.[7]

4. Motorola, in its "Motion for Clarification," does not contend that the documentation required by our *January 10 Order* is in any sense unclear. It states rather that, *in addition to* the documents required by the *January 10 Order*, "there are a number of other documents that are critical to determining whether the Affiliate's structure meets the Commission's standard."[8] Motorola then describes these "other documents" in a manner suggesting discovery requests used in litigation, complete with such expansive phrases as "[a]ll documents that mention any relationship between . . . ."[9]

5. We do not believe such "clarification" is warranted here. Motorola seems in its pleadings to have a very specific idea of the documents we have ordered COMSAT to file; it simply wants the list expanded. We do not rule out the possibility that some of the additional documents described by Motorola are already required by our *January 10 Order*. But our *January 10 Order* deliberately eschewed any enumeration of specific documents other than "the organic documents of the Affiliate," instead referring to the issues to be addressed and the standard set forth in the *Inmarsat-P Declaratory Ruling*. It is for COMSAT in the first instance to determine what documents are necessary to support a favorable ruling from the Commission on its filing. If COMSAT fails to submit sufficient documentation, Motorola and any other interested parties will have an opportunity to make us duly aware of the defects in COMSAT's showing.

6. Accordingly, IT IS HEREBY ORDERED that Motorola's "Motion for Clarification" is DENIED.

7. IT IS FURTHER ORDERED that this Order be effective upon its adoption on February 13, 1995.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Bureau Chief

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[1] Motorola's Motion for Clarification (filed February 9, 1995).

[2] Participation by COMSAT Corporation in a New Inmarsat Satellite System Designed to Provide Handheld Communications Services, DA 95-31 (released Jan.10, 1995) (the "*January 10 Order*").

[3] *See generally* In re Petition of Motorola Satellite Communications, Inc. for Declaratory ruling Concerning Participation by COMSAT Corporation in a New Inmarsat Satellite System Designed to Provide Service to Handheld Communications Devices, 9 F.C.C. Rcd. 7693 (1994) (the "*Inmarsat-P Declaratory Ruling*").

[4] *January 10 Order* at ¶ 25.

[5] *Id.* at ¶ 26.

[6] *Id.* at ¶ 27.

[7] *Id.*

[8] Motorola's Motion for Clarification at 2.

[9] *Id.* at 3-4.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 17, 1995

AMERITECH OPERATING COMPANIES AND UNITED AND CENTRAL TELEPHONE COMPANIES FILE COST ALLOCATION MANUAL REVISIONS RELATED TO VIDEO DIALTONE

PUBLIC COMMENT INVITED

The Ameritech Operating Companies (Ameritech) and the United Telephone and Central Telephone Companies (United & Central) have filed revisions to their cost allocation manuals (CAMs) for the separation of regulated and nonregulated costs. These revisions reflect nonregulated services the carriers will provide in connection with video dialtone. Ameritech filed its revisions on February 3, 1995, and United & Central filed its revisions on behalf of Carolina Telephone and Telegraph Company on January 27, 1995. Listed below are the file numbers assigned to each revision.

United & Central	AAD 95-25
Ameritech	AAD 95-26

Parties may file comments on the proposed revisions to the CAMs no later than **March 22, 1995**. Replies should be filed by **April 7, 1995**. Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202)857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan at (202) 418-0810.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Hilton Head Television, Inc. File No. BRCT-911031KH

For Renewal of License of
Station WTGS(TV)
Hardeeville, South Carolina

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: February 3, 1995; Released: February 17, 1995

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) a license renewal application for the captioned television station; (ii) a Petition to Deny timely filed on November 1, 1991, by the North and South Carolina State Conferences of Branches of the NAACP (hereinafter "NAACP") against the captioned renewal application; (iii) the licensee's inquiry response; and (iv) a Joint Request for Approval of Settlement Agreement filed by the NAACP and the licensee of Station WTGS(TV).

II. BACKGROUND

2. The NAACP alleged that WTGS(TV) violated our Equal Employment Opportunity (EEO) rule and policies. Accordingly, it requested that we conduct an investigation of the station's employment practices pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*) and designate the renewal application for hearing.

III. PLEADINGS

3. *Settlement Agreement.* On February 7, 1992, the NAACP and the licensee of Station WTGS(TV) filed a Joint Request for Approval of Settlement Agreement which requests approval of the agreement, dismissal of the petition to deny, and grant of the station's license. We have reviewed the settlement agreement pursuant to 47 C.F.R. §73.3588 and *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780 (1989). We find that the settlement agreement complies with the Commission's rules and policies and, therefore, the petition is dismissed.

4. However, as is our practice in all cases, we reviewed the station's EEO program and performance pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1). We find that the licensee did not undertake adequate recruitment efforts to attract minorities, particularly Blacks, the largest minority component of the relevant available labor force; failed to maintain adequate records; and failed to engage in self-assessment. We will, therefore, grant renewal subject to appropriate remedies and sanctions as discussed below.

IV. DISCUSSION

5. Section 73.2080 of the Commission's Rules, 47 C.F.R. §73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. The Commission also focuses on any evidence of discrimination by the licensee. See Sections 73.2080(b) and (c) of the Commission's Rules, 47 C.F.R. §§73.2080(b) and (c).

6. When the renewal application indicates an absence of evidence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of remedies and sanctions, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the renewal application for hearing where the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO); see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters). *See e.g., Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Bilingual, supra.*

7. The licensee's renewal application and inquiry response reveal that the station filled 42 vacancies, including 35 upper-level positions, from January 1988 to November 1991.[1] In its renewal application, the licensee indicates that it contacted the following general sources and received the cited number of minority referrals: the *Savannah News* (6), the *Beaufort News* (2), the South Carolina Employment Service (2), the Savannah Georgia Employment Service (1), the Beaufort/Jasper County Career Education Center (0), Armstrong State College (0) and referrals from current employees (0). The licensee also indicates that it contacted but received no minority referrals from a minority source, Savannah State College,[2] and had one minority walk-in

[1] Four additional positions were filled by promotion of existing employees. All four positions were upper-level jobs: Business Manager, Promotions Manager, Engineering Technician and Switcher Technician. Two white males and two white females were promoted into the four jobs.

[2] Savannah State College is a predominantly Black educational institution.

referral. In its inquiry response, the licensee provided recruitment information for 17 of its 42 hires, although it appears that these data include only the referral sources of the hirees and not all sources contacted. Of these 17 hires, eight were listed as rehires, referred by employees, or were chosen from applications already on file. The referral sources of the remaining nine hirees included the newspaper, a technical college, a "manager firm" and the South Carolina Job Service.

8. The licensee did not provide information concerning gender or race of applicants for 26 of 42 positions (62%).[3] The licensee represented, however, that it hired minorities (one Hispanic and four Blacks) for five of these 26 positions. There is no evidence that minorities were in the applicant pools for any of the other 21 vacancies for which the licensee provided no applicant data. There were no minority applicants for five of the remaining 16 positions for which the licensee had records.

9. Based on the licensee's submission, minorities were apparently not in the applicant pool for 26[4] of the 42 positions (62%), and Blacks apparently were not in the applicant pool for 27 of 42 positions (64%). No information is provided concerning any licensee self-assessment. Nine (seven Blacks, one Hispanic, and one Asian) were hired as part of the 42 overall positions, including six (four Blacks, one Hispanic and one Asian) as part of the 35 upper-level positions.[5]

10. There are no substantial or material questions of fact to warrant designation for hearing. *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). Moreover, there is no evidence that the licensee engaged in employment discrimination. According to the recruitment and hiring information provided by the licensee, it contacted recruitment sources, albeit sporadically, and hired minorities for overall and upper-level positions. Therefore, renewal of the license is in the public interest.

11. However, we find WTGS-TV's overall recruiting efforts deficient. Based on the record before us, the licensee did not contact minority specific sources for any of its vacancies, as required by Section 73.2080(c)(2) of our rules, 47 C.F.R. § 73.2080;[6] and apparently failed to recruit Blacks for 27 (64%) of its 42 vacancies. The licensee also failed to maintain adequate records for meaningful self-assessment.[7] 47 C.F.R. § 73.2080.

12. We believe that the record in the instant case is similar to, but more egregious than, that of the licensee of WGBR-AM/WEQR-FM, Goldsboro, North Carolina, in *Application of Eastern Carolina Broadcasting Company, Inc. for Renewal of Station WGBR-AM and WEQR-FM*, 4 FCC Rcd 1621 (1989) (*Goldsboro*).[8] The licensee therein did not contact any minority recruiting sources for its 62 hires. The licensee hired four Blacks, late in the license term. WGBR-AM/WEQR-FM could not document recruitment, applicant or interview pool information for each position. Of particular concern was the fact that the number of Black employees -- the largest minority group in the relevant labor force -- declined during the license term. In that case, we concluded that the licensee failed to engage in adequate recruitment and conduct meaningful self-assessment of its EEO program, given the lack of minority referrals and hires. The stations' licenses were renewed for a short-term, subject to reporting conditions, and a $7,000 Notice of Apparent Liability for forfeiture was issued.

13. *Goldsboro*, issued in 1989, was decided based on a former forfeiture authority, which was significantly lower.[9] Previously, the forfeiture penalty assessed against a broadcaster could "not exceed $2,000 for each violation or each day of a continuing violation, except that the amount assessed for any violation could not exceed a total of $20,000." In 1989, Congress substantially increased the dollar amounts of our forfeiture authority. Pub. L. No. 100-239, 103 Stat. 2131. Pursuant to Section 503(b)(2), the forfeiture penalty assessed against a broadcaster may "not exceed $25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act."

14. The record in this case indicates that the licensee recruited for only nine (21%) jobs; that minorities were present in only 16 (38%) applicant pools; that Blacks were present in only 15 (36%) applicant pools; and that no minority sources were contacted for specific vacancies. Given the substantial presence of Blacks (48.0%) in the Jasper County, South Carolina available labor force, the licensee's failure to recruit so as to attract Black applicants is particu-

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[3] The licensee states that "under prior management, adequate EEO records were not kept in a satisfactory manner." The licensee did not provide data regarding interviewees, as requested in our inquiry letter.

[4] We calculated this figure by adding 21, the number of vacancies where the licensee provided no applicant data and a minority was not hired, and five, the number of vacancies where the licensee provided applicant data, which indicated no minorities were in the applicant pool.

[5] The Jasper County, South Carolina labor force is 49.2% minority (48.0% Black and 1.2% other). The station's 1987 Annual Employment Report lists five minorities (four Blacks and one Hispanic) on an overall staff of 22 (22.7%) and on an upper-level staff of 19 (26.3%). In 1988 the station employed five Blacks on an overall staff of 26 (19.2%) and four Blacks on an upper-level staff of 21 (19.0%). In 1989, the station employed four Blacks on an overall staff of 27 (14.8%) and two Blacks on an upper-level staff of 21 (9.5%). In 1990, the station employed four Blacks on an overall staff of 25 (16.0%) and two Blacks on an upper-level staff of 20 (10.0%). In 1991, the station employed three Blacks on an overall staff of 21 (14.3%) and one Black on an upper-level staff of 17 (5.9%).

[6] The record does not indicate when or in what form contact was made by WTGS(TV) with the sole minority source listed in its renewal application, Savannah State College. Therefore, there is no evidence that WTGS(TV) ever contacted this source for a specific vacancy.

[7] The licensee is reminded that under our EEO Rule, 47 C.F.R. § 73.2080, it is required to self-assess its EEO program regarding both minorities and women. Inasmuch as WTGS(TV) neglected to keep records of applicant flow and of recruitment contacts, evaluation of its efforts regarding women, as well as minorities, was affected.

[8] Wayne County, North Carolina had a 29.0% Black labor force.

[9] Section 503(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(2), authorizes the Commission to impose monetary forfeitures on broadcast station licensees or permittees for violations of the Act or of regulations promulgated thereunder.

larly egregious.[10] Further, it failed to maintain adequate records for meaningful self-assessment. The licensee provided applicant pool data for just 16 of 42 vacancies and apparently did not keep records regarding interview pools.

15. The similarities between the above-cited stations' EEO records are clear. Both licensees failed to maintain complete EEO records, which we believe better enable a licensee to self-assess the effectiveness of its recruitment efforts. In addition, both licensees failed to contact minority sources for any of their vacancies. In both cases, the number of minorities on the stations' staffs decreased significantly during the license term, evidencing a failure of the licensees to adequately self-assess their EEO programs regarding minorities. However, the EEO record of WTGS(TV)is more egregious because it had a significantly higher percentage of Blacks in its labor force (48.0%) than did WGBR-AM/WEQR-FM (29.0%). WTGS(TV)'s location in an area where the Black labor force alone constituted almost half the total available labor force should have compelled it to increase its outreach efforts to include use of minority-specific sources when vacancies occurred. Indeed, a more deliberate use of general recruitment sources may have yielded better results.[11] Given the facts of this case, we feel that the circumstances in this case warrant granting the renewal for a short-term subject to reporting conditions and a Notice of Apparent Liability for $27,500.

V. CONCLUSION

16. After reviewing the record before us, we find that no hearing is warranted and that renewal of the license of WTGS-TV is appropriate. However, we will grant the renewal for a short term subject to reporting conditions and issue a Notice of Apparent Liability for $27,500.

VI. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that the Joint Request for Approval of Settlement Agreement filed by the NAACP and the licensee of WTGS(TV) IS GRANTED, the settlement agreement IS APPROVED and the petition filed by the NAACP IS DISMISSED.

18. IT IS FURTHER ORDERED that the license renewal application filed by Hilton Head Television, Inc. for Station WTGS(TV) IS GRANTED FOR A SHORT TERM ending December 1, 1995, subject to reporting conditions as specified herein, and pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $27,500.

19. IT IS FURTHER ORDERED that the licensee of WTGS(TV) submit to the Commission an original and one copy of the following information on August 1, 1995:

(a) For the report, please make two lists divided by full-time and part-time vacancies during the 12 months preceding the reporting date, indicating the job title and FCC job category of the position, the race or national origin, sex and the referral source of each applicant for each and the race or national origin and sex of the person hired. The lists should also note which recruitment sources were contacted;[12]

(b) A list of employees as of the July 1, 1995, payroll period by job title and FCC job category indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin;

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

20. IT IS FURTHER ORDERED that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this *Memorandum Opinion and Order and Notice of Apparent Liability* to all parties.

21. The report is to be filed with the Secretary of the Commission to the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch (202-632-7069). Regarding the forfeiture proceedings, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this *Memorandum Opinion and Order and Notice of Apparent Liability*. Any comments relating to the ability to pay should include those financial letters set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[10] *See* 47 C.F.R. § 73.2080(c). *Broadcast EEO* at 3969.

[11] *See South Carolina Renewals*, 5 FCC Rcd 1704, 1709 n.8 (1990).

[12] Such a list might start:

(1) News Director; Officials and Managers:

Full-time		
3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP Selected: Black male (03/15/95)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Viacom Cable Contra Costa County, California	CUID Nos. CA0069, CA0070, CA0075, CA0924

Benchmark Filings to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1994; Released: January 3, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price Viacom Cable ("Viacom") was charging for its cable programming service ("CPS") tier in the Contra Costa County, California, communities designated by the CUID numbers referenced above. Viacom has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This order addresses the reasonableness of Viacom's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first valid CPS complaints in the franchise areas addressed in this Order were completed and served on Viacom and received by the Commission on the dates set forth in Appendix A.

5. Viacom filed its first FCC Form 393 filings for Pinole, California, CUID No. CA0069; San Pablo, California, CUID No. CA0070; and Crockett, California, CUID No. CA0075, on December 13, 1993. Viacom filed its first FCC Form 393 filing for Rodeo, California, CUID No. CA0924, on January 6, 1994. Viacom filed amended FCC Form 393 filings for each franchise area on June 14, 1994 and also on June 27, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

DISCUSSION

6. Viacom asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are lower than the maximum permitted charges as calculated in the filings. However, upon review we have determined that Viacom has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustment to Viacom's calculations in Form 393:

a. In its amended filings of June 27, 1994, Viacom states that it calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Viacom has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Viacom implemented its CPS prices under the new regulations. See para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in Viacom's prices for the period after May 14, 1994 may be required to reflect the fact that Viacom's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

it relied on when it set its CPS prices. If Viacom had done so correctly (i.e., if it had completed Form 393 with accurate data, including the most recent inflation data available as of the time it set its prices), and if based on this data Form 393 indicated that its prices were reasonable, then Viacom would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[12] However, the figures Viacom used are not consistent with data on which it should have relied in setting its CPS prices. Specifically, Viacom used data released by the U.S. Department of Commerce on August 31, 1993, to complete Lines 122 and 125, but used earlier data to calculate the Inflation Factor on Line 123. Furthermore, Viacom claimed Adjustment Time Periods extending through November and December 1993 (Line 124), which are inconsistent with an attempt to justify rates based on August 1993 data. Viacom's calculation of the Inflation Adjustment Factor is thus incorrect.

b. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Viacom filed.[13] On its amended Forms 393, Viacom entered 14 months on Line 124 for three of the CUIDs, indicating that these filings were as of the end of November 1993, and entered 15 months for CUID No. CA0924, indicating that this filing was as of the end of December 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index (GNP-PI) figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate Inflation Adjustment Factors through November and December 1993, the base dates Viacom used in justifying its rates, of 1.032 and 1.034, respectively.

7. Because of this error, we conclude that Viacom has failed to demonstrate that its prices for the CPS tier were not unreasonable. We will therefore set prices for this tier, incorporating the adjustment discussed above. This adjustment has the effect of reducing the maximum permitted monthly CPS tier price for each franchise area to the levels set forth in Appendix B.

CONCLUSIONS

8. Upon review of the record herein, we conclude that Viacom's showing supports the maximum reasonable CPS tier price for each franchise area set forth in Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994.[14] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that Viacom must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that Viacom's prices during the earlier period were unreasonable.[15] We reserve the right to make further adjustments to Viacom's prices for the period after May 14, 1994, upon completion of our review of Viacom's FCC Form 1200 rate filings.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Viacom Cable in Pinole, California, CUID No. CA0069; San Pablo, California, CUID No. CA0070; Crockett, California, CUID No. CA0075; and Rodeo, California, CUID No. CA0924, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED, that the benchmark filings submitted by Viacom Cable with respect to Pinole, California, CUID No. CA0069; San Pablo, California, CUID No. CA0070; Crockett, California, CUID No. CA0075; and Rodeo, California, CUID No. CA0924, for the period beginning with the filing of the first valid complaint in each franchise area and ending on May 14, 1994, as set forth on Appendix A, justify the maximum price in each franchise area set forth in Appendix B (plus franchise fee) for Viacom Cable's cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Viacom Cable shall refund to subscribers that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[16] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED, that Viacom Cable shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

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[12] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316 (1994) (*"Third Order on Reconsideration"*).

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] This finding is based solely on the representations of Viacom listed in paragraph 5, *supra*, and the modification described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] We reviewed Viacom's FCC Form 1200 rate filings and confirmed that Viacom calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

[16] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Viacom Cable shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to Pinole, California, CUID No. CA0069; San Pablo, California, CUID No. CA0070; Crockett, California, CUID No. CA0075; and Rodeo, California, CUID No. CA0924, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).

15. IT IS FURTHER ORDERED , that Viacom Cable shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
0069	12/13/93	11/10/93
0070	12/20/93	11/12/93
0075	12/20/93	11/12/93
0924	12/30/93	12/7/93

Appendix B

CUID No.	Actual Rates	Maximum Reasonable Rates
0069	$9.26	$9.14
0070	$9.25	$9.13
0075	$9.25	$9.14
0924	$9.25	$9.14

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Star Cable Associates — CUID No. OH2068 (Berlin, OH)

Cost of Service Filing To Support
Cable Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1994; Released: December 29, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 22, 1993, Star Cable Associates ("Star Cable") filed a cost of service submission with the Commission in response to a complaint that alleges that Star Cable's cable programming service ("CPS") rate in its Berlin, Ohio franchise is excessive.[1] On July 12, 1994, Star Cable supplemented and amended its filing as permitted by the Bureau's *May 23 Order*.[2]

2. Star Cable's cost of service filing seeks to establish that Star Cable's rate of $15.25 per month for the period September 1, 1993 to May 14, 1994, is justified based on Star Cable's cost of providing CPS. Our review of the record indicates that, although not all of the costs in Star Cable's showing are allowable under general cost of service principles, even if we disallow those non-allowable costs, Star Cable's CPS rate in effect for the referenced time period is justified under general cost of service principles.[3]

3. According to information provided by Star Cable in its cost of service submission, its system provides service to approximately 444 basic subscribers and 443 CPS subscribers. Star Cable provides nine channels on its basic tier and seventeen channels on its CPS tier.

4. We emphasize that in this review process, pursuant to the 1992 Cable Act, we are analyzing rates for a limited past period, solely for the purpose of determining whether any refund liability has arisen.[4] As discussed below, we are applying general cost of service principles with Commission rules and guidance that were available at the time these filings were made.

II. BACKGROUND

5. On May 3, 1993, the Commission released its *Rate Order* establishing rules to implement the cable television rate regulation provisions of the 1992 Cable Act. In the *Rate Order*, the Commission determined that a benchmark approach should serve as the primary method for regulating basic service and CPS rates. The Commission also concluded that because the benchmark methodology might not produce fully compensatory rates in all cases, it was appropriate to permit operators, as an alternative, to justify rates based on costs, using individual cost of service showings.[5] The cost of service approach was intended to be used only if an operator believed that the maximum rate permitted under the benchmark formula would not enable the operator to recover costs reasonably incurred in providing rate regulated cable services.

6. The Commission found, however, that the record before it at the time of the adoption of the *Rate Order* did not provide sufficient information on which to develop detailed cost of service rules for the cable industry.[6] Therefore, on July 16, 1993, the Commission issued a Notice of Proposed Rulemaking which proposed requirements to govern cost of service showings submitted by cable operators seeking to justify rates higher than those determined under the benchmark approach.[7] The Commission indicated in the *Notice*, as it did in the *Rate Order*, that general cost of service principles would apply to cost of service

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[1] The complaint accepted by the Commission was filed on October 19, 1993. Although not moving to dismiss the CPS complaint, Star Cable argues in its cost of service filing that the underlying complaint is procedurally defective. Star Cable alleges in particular that the complaint lacks a copy of an invoice, fails to identify the local franchising authority, references a combined CPS and basic services rate, and includes references to increases pre-dating the effective date of regulation under the 1992 Cable Act. Star Cable's assertions do not persuade us that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Accordingly, we reject Star Cable's arguments that the complaint should be dismissed.

[2] Cable Operators' Rate Justification Filings, Sections 76.945, 76.956 of the Commission's Rules, Order, DA 94-526 (released May 23, 1994) (*"May 23 Order"*); *see also*, Cable Operators' Rate Justification Filings, Order, DA 94-619 (released June 14, 1994). Prior to the deadline for amending or supplementing cost of service filings, Commission staff contacted Star Cable by telephone (with follow-up confirmation letter), to provide the operator with informal guidance as to specific information that staff's preliminary review indicated should be added to or corrected in the operator's pending filing.

[3] This Order does not make any findings or rulings regarding Star Cable's rates for basic service and equipment, or premium services. Regulation of rates for basic service and equipment is generally the responsibility of the local franchising authorities, and premium services are unregulated. *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5637 (1993) (*"Rate Order"*). Data for these services were reviewed only to the extent needed for our evaluation of the reasonableness of an operator's CPS rates.

[4] *See* Communications Act of 1934, as amended by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"), at § 623(c)(1)(C). The 1992 Cable Act authorizes the Commission to order that the operator refund to subscribers that portion of rates paid after the filing of a valid complaint, that are then found to be unreasonable.

[5] Rate Order, 8 FCC Rcd at 5794-95; *see also*, 47 C.F.R. § 76.922.

[6] *Rate Order*, 8 FCC Rcd at 5798-99.

[7] Implementation of Sections of the Cable Television Con-

filings submitted prior to the adoption of specific rules.[8] Star Cable's cost of service filing under review here was submitted during that pre-adoption time period and covers only the period prior to May 15, 1994. We are analyzing the rates in effect for the period prior to May 15, 1994, as the Commission instructs, under general cost of service principles, not under the rules adopted by the Commission in February 1994.[9]

III. DISCUSSION

7. In analyzing Star Cable's cost of service submission, we considered that the cost of service approach permits rates to be set to allow a company to recover the reasonable costs of providing rate regulated cable services, including an opportunity to earn a fair return on its investment.[10] If we find that a certain rate base or expense element is not supported, is excessive, or is unrelated to providing rate regulated cable service, we can disallow that cost in whole or in part.[11] We have evaluated rate base and expense items to determine whether Star Cable should be permitted to recover those items in its rates. In some cases, we have found costs that are not allowable, and we have made appropriate adjustments. Even with our adjustments and disallowances, however, we find that Star Cable's CPS rate for the period under review has been justified.

8. **Rate Base:** Rate base represents the amount of investment the cable company makes in its facilities to provide service to its customers. Under traditional cost of service principles, it is necessary to determine the allowable rate base in order to calculate the revenue requirement based on the applied rate of return. In analyzing Star Cable's filing, we reviewed the components of Star Cable's rate base to determine the investment upon which Star Cable is entitled to earn a return. For purposes of this review, we made adjustments to the rate base as discussed below.

(a) *Operating Losses :* Star Cable proposes to include start-up losses of $217,811 in its rate base, of which $119,445 has been allocated to the CPS portion of the rate base. For this review we are allowing operating losses accumulated over the prematurity period as defined by Statement of Financial Accounting Standards No. 51, Financial Reporting by Cable Television Companies ("FAS 51").[12] Under FAS 51, the prematurity phase of a cable television system is presumptively no longer than two years, although it may arguably be longer. Star Cable did not provide any argument that its prematurity period was longer than two years. Accordingly, for purposes of this analysis, the recovery of accumulated start-up losses in Star Cable's rate base is limited to two years.

(b) In reviewing Star Cable's filing, we were unable to determine what portion of the $119,445 represents the system's first two years of start-up losses because Star Cable did not specify that the start-up losses reported are limited to the losses incurred in the first two years. Star Cable indicated, however, that cable service was inaugurated in 1990, and it is possible, therefore, that the losses claimed in Star Cable's filing reflect losses for a four-year period beginning in 1990. Using this worst case assumption, we have calculated Star Cable's start-up losses for the first two years as $53,086, net of accumulated amortization. We adjusted the rate base to disallow 50% (two of the four years' worth) of the claimed start-up losses and related accumulated amortization expense. Therefore, the following adjustments were made:

	Star Cable Proposed	Commission Adjustment[13]	Allowable Start-up Losses
Start-up Losses	$119,445	($ 59,723)	$ 59,722
Accum. Amortization (Start-up Losses)	($ 0)	$ 6,636	($ 6,636)
Total	$119,445	($ 66,359)	$ 53,086

9. **Rate of Return:** A regulated entity is entitled to the opportunity to earn a fair return on investment.[14] That return should be sufficient to ensure confidence in the financial integrity of the enterprise,[15] but should be bal-

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sumer Protection Act of 1992: Rate Regulation, MM Docket No. 93-215, Notice of Proposed Rulemaking, FCC 93-353 (released July 16, 1993), 58 Fed. Reg. 40762 (July 30, 1993) (*"Notice"*) .

[8] *Id.* at 40763; *Rate Order*, 8 FCC Rcd at 5798-99, 5854, n.859.

[9] In February 1994, the Commission adopted an order setting forth specific regulatory requirements to govern cost of service filings to justify rates above levels determined under its benchmark requirements. The new rules apply to rates charged or to be charged after May 15, 1994. *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 93-215, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd 4527 (1994) (*"Cost Order"*).

[10] *See Notice* at 40765:

> Under traditional cost-of-service regulation, rates are set at a level to provide the company with recovery of its costs and a reasonable opportunity to earn a fair return on its invested capital. Under the traditional formulation, the company's revenue requirement is equal to the expenses of providing service and its return on investment.

[11] The Commission made clear that the fact that an operator has incurred costs does not necessarily establish its right to recover those costs from subscribers. *See Rate Order*, 8 FCC Rcd at 5794, n.619. "When electing [to make] a cost of service showing, the cable operator assumes the risk that its rate could be lowered if such action is justified by the cost showing." *Id.* at 5800, para. 272.

[12] FAS 51 establishes standards of financial accounting and reporting for costs, expenses, and revenues applicable to the construction and operation of cable television systems. These standards are considered to be generally accepted accounting principles, and provide guidance as "general cost of service principles," in the absence of specific rules. Under these standards, when a cable system is partially under construction and partially in service (the prematurity period), costs incurred that relate to both current and future operations shall be partially capitalized as start-up costs and partially expensed.

[13] Our adjustment includes an allocation of start-up losses based on the ratio of channels on each tier to the sum total of all channels offered (including those on non-regulated tiers). As discussed in detail below in para. (c), this allocation method is the appropriate method pursuant to the Commission's rules in effect at the time of Star Cable's filing.

[14] *Notice* at 40769.

[15] *Id.; see also, Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591, 603 (1944).

anced with our interest in protecting a company's subscribers. In the *Rate Order* the Commission stated that it would make a case-by-case determination of reasonableness for submissions made before specific cost rules could be adopted.[16] In the rulemaking notice initiating a proceeding to adopt such rules, released several weeks before the submission date of these initial cost of service filings, the Commission discussed its analysis of rate of return generally, and tentatively concluded that an after-tax, overall rate of return in the range of 10-14% would reflect a reasonable balancing of subscriber and cable operator interests.[17] In the *Notice*, the Commission reached its tentative conclusion of a range of reasonableness from 10-14% based on a summary analysis of the cost of equity and the capital structure of regulated cable services.[18] The *Rate Order* postulated a case-by-case determination of reasonableness regarding the rate of return. As a general approach for evaluation of refund liability from cost of service showings submitted before the effective date of the cost of service rules, we find it appropriate and reasonable to make reference to the range discussed in the *Notice* for our analysis, and to determine the reasonableness of the proffered return in light of that range and of other evidence presented. Star Cable's submission includes an after-tax overall rate of return of 11.25%. This return is reasonable, and we will accept Star Cable's application of an 11.25% rate of return for purposes of our review in this proceeding.

10. **Operating Expenses:** Cable operators may recover in rates their reasonable expenses normally associated with providing rate regulated cable services. Our review of Star Cable's expenses under general cost of service principles results in the adjustments discussed below.

(a) *Amortization Expense:* Under general cost of service principles, Star Cable may include a related allowance for amortization expense related to start-up losses. Although Star Cable's rate base includes an allowance for start-up losses (even as adjusted above), Star Cable does not claim an allowance for amortization expense related to start-up losses. We have, therefore, adjusted Star Cable's analysis to include an amortization expense allowance.

(b) According to generally accepted accounting principles, capitalized start-up losses are to be amortized over the same period used to depreciate the main cable television plant.[19] We believe this is the appropriate standard for the amortization allowance for start-up losses recoverable in regulated charges. Star Cable uses various lives for its headend, trunk and distribution facilities.[20] We have therefore used a weighted average of these lives, an eighteen-year period, for purposes of amortizing Star Cable's allowable start-up losses of $59,722 (as determined above). This results in an allowable annual amortization expense of $3,318. Because Star Cable did not include any amortization expense entry, we have adjusted Star Cable's analysis to include this expense.

(c) *"Other" Expenses:* Star Cable includes operating costs under the category "Other Expenses" of $2,761 (allocated to CPS). Star Cable provides no explanation of the expenses associated with this entry, and we have, therefore, disallowed the amount of $2,761.

11. **Income Tax Allowance:** Star Cable calculates its income tax allowance by simply multiplying its effective tax rate by the equity portion of its return. Star Cable did not compute the tax gross-up rate which requires multiplying the equity portion of the return by the effective tax rate and dividing this amount by (1 - the effective tax rate). Star Cable's methodology is incorrect because it does not allow Star Cable to recover its full provision for income taxes, resulting in a lower earned rate of return. Star Cable also used an incorrect state income tax rate.[21] We have adjusted Star Cable's income tax allowance to reflect the use of the proper methodology as well as the use of the appropriate state income tax rate. Such adjustment increases Star Cable's income tax component from $14,630 to $18,103 (an additional $3,473 to the CPS rate justification).

12. **Star Cable's Proposed Future Rate Increases:** Star Cable indicates in its filing that it does not intend to increase its CPS rate immediately, but that it proposes increases of approximately 4-7% percent per year over the next several years, depending on general inflation and increases in uncontrollable expenses. With regard to the issue of future rate increases, we note that our rate orders and regulations address what are allowable increases and the appropriate procedures for justifying such increases. Once a rate is established through a cost of service showing, the price cap mechanism will govern future increases of the sort Star Cable discusses.[22] The review of Star Cable's rate in this proceeding is to determine the reasonableness of the rate in effect for the period September 1, 1993 to May 14, 1994. Star Cable must file a rate justification for the rates it will charge after May 14, 1994, pursuant to the Commission rules, effective May 15, 1994. Therefore, discussion of Star Cable's proposal regarding future increases is premature.

IV. CONCLUSION

13. Based on our review of Star Cable's cost of service filing and supplemental information, applying general cost of service principles and applicable cost allocation rules, we find that, while Star Cable's cost of service showing

[16] *Rate Order*, 8 FCC Rcd at 5795, para. 264.

[17] *See Notice* at 40765. Since the release of the *Notice*, the Commission has adopted a unitary rate of return for cable of 11.25%. *Cost Order*, 9 FCC Rcd at 4612, para. 147. The Commission adopted the 11.25% rate of return on an interim basis, based on evidence in the record. However, the *Cost Order* applies to rate justification filings submitted after the effective date of the rules, and not to filings already pending. *Id.* at 4527, para. 5; *see also, Rate Order*, 8 FCC Rcd at 5854, n.859.

[18] *See Notice* at 40765.

[19] *See* Statement of Financial Accounting Standards No. 51, Financial Reporting by Cable Television Companies, FAS 51, para. 10.

[20] Star Cable depreciates its primary cable plant over a ten-year, twelve-year, and 20-year period.

[21] Star Cable used a state income tax rate of 12.25%; the appropriate rate is 8.9%. Ohio Rev. Code § 5733.06.

[22] *Cost Order*, 9 FCC Rcd at 4533, para. 8.

overstates its revenue requirement, the CPS rate Star Cable seeks to justify for the period under review, $15.25, is supported by this showing.[23]

14. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the CPS rate charged by Star Cable Associates with respect to the above-referenced community, for the period September 1, 1993, to May 14, 1994, of $15.25, IS JUSTIFIED under general cost of service principles and applicable allocation rules, and that no refund liability for CPS service during that period will be imposed.[24]

15. IT IS FURTHER ORDERED that the complaint filed against Star Cable Associates regarding its CPS rate for the period September 1, 1993, to May 14, 1994, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[23] This finding is based solely on the representations of Star Cable in its cost of service filing. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein (including the operator's Form 393).

[24] The findings in this Order do not in any way prejudge the reasonableness of prices for CPS service after May 14, 1994 under our rate regulations. However, to the extent Star Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration* (Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994)), the CPS rate found reasonable herein might also apply from May 15, 1994 until the date on which Star Cable implemented its CPS price under the new regulations.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Viacom Cable San Francisco, California and Sonoma County, California	CUID Nos. CA0245, CA0357, CA0358

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1994; Released: January 3, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price Viacom Cable ("Viacom") was charging for its cable programming service ("CPS") tier in San Francisco, California, CUID No. CA0245, and Sonoma County, California CUID Nos. CA0357 and CA0358. Viacom has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This order addresses the reasonableness of Viacom's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the periodhbeginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first valid CPS complaints in the franchise areas addressed in this Order were completed and served on Viacom and received by the Commission on the dates set forth in Appendix A.

5. Viacom filed its first FCC Form 393 filing on December 1, 1993, for San Francisco, CUID No. CA0245, and on December 9, 1993, for the two Sonoma County CUIDs, CA0357 and CA0358. Viacom filed amended FCC Form 393 filings on June 27, 1994, for the two Sonoma County CUIDs, and on June 28, 1994, for San Francisco, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

DISCUSSION

6. Viacom asserts that its monthly CPS tier prices are justified by its amended benchmark filings because its prices are lower than the maximum permitted charges as calculated in the filings. However, upon review we have determined that Viacom has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Viacom's calculations in Form 393:

a. In its Form 393 filing for San Francisco, CUID No. CA0245, Viacom's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part II, Worksheet 1 and Form 393, Part I) count channel 38 as a satellite channel on the CPS

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Viacom has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Viacom implemented its CPS prices under the new regulations. See para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in Viacom's prices for the period after May 14, 1994 may be required to reflect the fact that Viacom's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

tier.[12] However, according to the September 1, 1993 channel line-up presented in Viacom's June 28, 1994 amendment, channel 38 carried the premium Jade Channel programming seven hours per day and a CPS satellite service only five hours per day.

b. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. Under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or not subject to rate regulation and as either satellite or non-satellite. A "channel" is defined as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. The preponderance-of-use test is the only one consistent with this conceptual framework.[13]

c. We therefore reduce the number of satellite channels used in calculating the benchmark on Form 393, Part II, Worksheet 1, Line 121 from 33 to 32. We also reduce the number of CPS-tier channels on Form 393, Part II, Worksheet 1, and Form 393, Part I from 23 to 22. These adjustments have the net effect of increasing the benchmark channel rate entered on Line 121 of Worksheet 1 but reducing the maximum permitted CPS tier price in Part I, page 5.

d. In its amended filings of June 27 and June 28, 1994, Viacom states that it calculated the Inflation Adjustment Factors (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data it relied on when it set its CPS prices. If Viacom had done so correctly (i.e., if it had completed Form 393 with accurate data, including the most recent inflation data available as of the time it set its prices), and if based on this data Form 393 indicated that its prices were reasonable, then Viacom would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[14] However, the figures Viacom used are not consistent with data on which it should have relied in setting its CPS prices. Specifically, Viacom used data released by the U.S. Department of Commerce on August 31, 1993, to complete Lines 122 and 125, but used earlier data to calculate the Inflation Factor on Line 123. Furthermore, Viacom claimed an Adjustment Time Period extending through November 1993 (Line 124), which is inconsistent with an attempt to justify rates based on August 1993 data. Viacom's calculation of the Inflation Adjustment Factor is thus incorrect.

e. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Viacom filed.[15] On its amended Form 393, Viacom entered 14 months on Line 124, indicating that these filings were as of the end of November 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index (GNP-PI) figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through November 1993, the base date Viacom used in justifying its rates, of 1.032.

7. Because of these errors, we conclude that Viacom has failed to demonstrate that its prices for the CPS tier were not unreasonable. We will therefore set prices for this tier, incorporating the adjustments discussed above. These adjustments have the effect of reducing the maximum permitted monthly CPS tier price for each franchise area to the levels set forth in Appendix B.

CONCLUSIONS

8. Upon review of the record herein, we conclude that Viacom's showing supports the maximum reasonable CPS tier price for each franchise area set forth in Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994.[16] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that Viacom must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that Viacom's prices during the earlier period were unreasonable.[17] We reserve the right to make further adjustments to Viacom's prices for the period after May 14, 1994, upon completion of our review of Viacom's FCC Form 1200 rate filings.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable

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[12] Viacom states in its response to a complaint that its initial FCC Form 393 was erroneously based on 9 satellite channels on the CPS tier and that it was correcting that error and reflecting 10 channels in its computation in the amended Form 393. *See* Response of Viacom Cable-San Francisco System to a Complaint Concerning Rates for Cable Programming Services Provided in the City of San Francisco, page 1, filed June 28, 1994. However, we find that the correct number was 9 and in fact the calculations that Viacom made for 1992 were based on 9 channels. Therefore, we are making no adjustment based on the 1992 channel count.

[13] See Viacom Cable, Nashville, Tennessee, CUID No. TN0148, DA 94-1151, para. 6a-6c (released Nov. 9, 1994).

[14] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316 (1994) (*"Third Order on Reconsideration"*).

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[16] This finding is based solely on the representations of Viacom listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] We reviewed Viacom's FCC Form 1200 rate filings and confirmed that Viacom calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

programming service prices charged by Viacom Cable in San Francisco, California, CUID No. CA0245; Sonoma County, California, CUID No. CA0357; and Petaluma, California, CUID No. CA0358, and all other complaints related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED, that the benchmark filings submitted by Viacom Cable with respect to San Francisco, California, CUID No. CA0245; Sonoma County, California, CUID No. CA0357; and Petaluma, California, CUID No. CA0358, for the period beginning with the filing of the first valid complaint in each franchise area and ending on May 14, 1994, as set forth on Appendix A, justify the maximum price in each franchise area set forth in Appendix B (plus franchise fee) for Viacom Cable's cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Viacom Cable shall refund to subscribers that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[18] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED, that Viacom Cable shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Viacom Cable shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to San Francisco, California, CUID No. CA0245; Sonoma County, California, CUID No. CA0357; and Petaluma, California, CUID No. 0358, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).

15. IT IS FURTHER ORDERED, that Viacom Cable shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No. Complaint	Date First Filed with FCC	Date Complaint Served
0245	11/9/93	11/1/93
0357	11/12/93	11/9/93
0358	11/15/93	11/8/93

Appendix B

CUID No.	Actual Rates	Maximum Reasonable Rates
0245	$10.75	$10.32
0357	$ 9.28	$ 9.15
0358	$ 9.28	$ 9.15

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	**DA 94-1629**
	)	
AMERICAN CABLESYSTEMS OF CALIFORNIA, INC. AND AMERICAN CABLESYSTEMS OF SOUTH CENTRAL LOS ANGELES, INC.	)	
	)	
Petition for Reconsideration	)	
	)	
of the Certification of the City of Los Angeles to Regulate Basic Cable Rates (CA0808, CA1267)	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1994 **Released: January 3, 1995**

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 6, 1993, American Cablesystems of California, Inc. d/b/a Continental Cablevision and American Cablesystems of South Central Los Angeles, Inc. d/b/a Continental Cablevision (collectively "Continental") filed a timely petition for reconsideration challenging the certification of the City of Los Angeles (the "City") to regulate rates for basic cable service in the franchise areas designated as FCC Community ID Nos. CA0808 and CA1267.[1] The City filed two oppositions to Continental's petition, one for each franchise area, to which Continental filed replies. Both parties submitted responses to the Bureau's requests for additional information and clarification.[2]

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[1] American Cablesystems of California, Inc. serves the franchise area designated CA0808 and American Cablesystems of South Central Los Angeles, Inc. serves the franchise area designated CA1267.

[2] *See* Letter from Lisa M. Higginbotham to American Cablesystems of California, Inc. and the City of Los Angeles dated July 27, 1994.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing, unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the effective date of certification.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

3. In its petition, Continental argues that its cable system in each of the two franchise areas is subject to effective competition because it serves fewer than 30 percent of the households in each of the franchise areas.[8] Continental asserts that it serves 28.1 percent of the "households" in franchise area CA0808 and 24.5 percent of the "households" in

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[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: 1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; 2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; 3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or 4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b)(4). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Cable Act (Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases upon which a cable system will be deemed subject to effective competition is if fewer than 30% of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905 (b)(1).

franchise area CA1267. As support for its original petition for reconsideration, Continental provides its September 1993 Quarterly Subscriber Statistical Report which covers both franchise areas. In its January 7, 1994 reply to the City's opposition, Continental includes a report providing 1990 housing unit and household data as well as 1992 estimated housing unit data for both franchise areas which was compiled by Claritas/NPDC, a census data and demographics firm. Continental's August 15, 1994 response contains a September 1993 monthly subscriber report and another Claritas/NPDC housing report for CA0808. The City responds by claiming that Continental serves 32 percent of the households in franchise area CA0808 and that there is no effective competition in either franchise area since Continental is the City's sole cable operator.

A. Franchise Area CA0808

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[9] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, exists in the franchise area.[10] With respect to franchise area CA0808, we find that Continental has failed to meet this burden. Continental miscalculated the number of subscribers and households in franchise area CA0808 when it determined its penetration level to be 28.1 percent. Continental's original petition states that hotel/motel accounts and other commercial accounts were included in its subscriber and household counts. Continental's petition also states that "households in each franchise area were determined by adding the number of housing units identified in the franchise area which have been entered into Continental's database plus the actual number of business addresses passed by the Continental system which have been entered into Continental's database."[11] Continental should not have counted commercial entities, including hotels and motels, when it calculated its penetration level. The 1990 Census defined the term "household" as "all the persons who occupy a housing unit."[12] Thus, commercial establishments, including hotels and motels, are not "households" for

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9 47 C.F.R. § 76.906.

10 47 C.F.R. § 76.911(b)(1).

11 *See* Partial Petition for Reconsideration of Certification at 3 (December 6, 1993); Declaration of John F. Gibbs, Vice President, Corporate and Legal Affairs of Continental Cablevision Southern California, Exhibit 1 of Partial Petition for Reconsideration of Certification (December 6, 1993).

12 *Third Recon. Order, supra.*

purposes of determining effective competition, and Continental should not have included them in its subscriber and household totals.[13]

5. Furthermore, it is not clear whether Continental excluded vacant housing units when it determined its penetration level to be 28.1 percent for franchise area CA0808. In deriving a total of 373,186 households for franchise area CA0808, Continental did not use either "household" or "occupied housing unit" census data, both of which exclude vacant housing units. As mentioned in the paragraph above, Continental claims that it used "the number of housing units identified in the franchise area."[14] When asked by the Bureau to clarify its definition of the term "housing unit," Continental did not specify whether vacant units were excluded from its housing totals. Rather, Continental argued that vacant units should be counted, suggesting that its totals do indeed include such units. However, as the Commission has stated, "[a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning in the 1990 Census that would include vacant units or even partial-year vacant units.[15]

6. Although Continental's original petition does not include sufficient housing information, Continental's later submissions contain additional housing data. However, Continental's presentation of the facts it claims support its contention appear to support the opposite conclusion. For example, in its January 7, 1994 reply to the City's opposition, Continental claims in a brief footnote that, even if commercial units were excluded from its subscriber and household counts, its penetration level in franchise area CA0808 would be 28.38 percent.[16] The data provided do not bear this out. In an exhibit attached to the January 7, 1994 reply, there is a chart showing 304,063 households (*i.e.*, occupied housing units) for CA0808, which an accompanying letter from Claritas/NPDC to Continental Cablevision explains is from the 1990 Census. This data would be appropriate for use in determining the total number of households. In addition, a copy of Continental's September 1993 monthly subscriber report, attached as Exhibit 4 to Continental's August 15, 1994

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[13] In response to Continental's petition, the City contends that Continental serves 32 percent of the households in franchise area CA0808. Unlike Continental, the City uses a household total that does not include hotels, motels, or commercial establishments. However, in determining a penetration level of 32 percent, the City uses Continental's subscriber total, which does include hotel/motel accounts and commercial accounts. Therefore, even if the City's total household count is accurate, its penetration determination is based on improper subscriber totals.

[14] *See* Petition, *supra*, note 11.

[15] *Third Order on Reconsideration*, MM Docket Nos. 92-266, 92-262, 9 FCC Rcd 4,316, 4,324 (1994) ("*Third Recon. Order*") (citing the Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.)

[16] *See Reply of American Cablesystems of California*, January 7, 1994, n.7.

response appears to show a total of 103,602 subscribers (excluding hotel/motel accounts and commercial subscribers).[17] However, when this household figure (304,063) is compared to the subscriber figure (103,602), Continental's penetration level is 34 percent.

7. In addition, in a footnote to its August 15, 1994 response, Continental asserts that, even using the Census figure for occupied households, it is subject to effective competition in franchise area CA0808. The evidence, however, does not support this claim. Continental refers to an exhibit attached to its response which provides 1993 household and housing unit data for franchise area CA0808. The exhibit shows 305,598 households and 329,678 housing units for the franchise area. Continental's penetration level exceeds 30% when either of these figures is compared with 103,602, the total number of subscribers in the franchise area, as referenced in paragraph 6. Therefore, we find that, even when using these housing figures, Continental has not demonstrated that it is subject to effective competition in franchise area CA0808. Accordingly, with respect to this franchise area, Continental's petition is denied.

B. Franchise Area CA1267

8. While Continental has not demonstrated with respect to franchise area CA1267 that it properly excluded vacant housing units and commercial entitities when it determined its penetration level to be 24.5 percent, there is sufficient information in the material it provides for us to make a determination. Specifically, in a footnote to its August 15, 1994 response, Continental claims that if 1990 Census data for occupied households were used, its penetration level in franchise area CA1267 would be 26.1 percent. The footnote indicates that there are 45,957 Continental subscribers and 176,208 households in franchise area CA1267. We will accept 176,208 as the correct household count since that number is supported by the chart containing 1990 Census data which is attached in Exhibit 1 to Continental's January 7, 1994 response. As shown by the subscriber printout attached in Exhibit 4 of its August 15, 1994 response, the 45,957 total for subscribers improperly includes commercial accounts; however, Continental provides sufficient information in the exhibit to enable us to determine that there are 45,819 residential subscribers in franchise area CA1267. Comparing this subscriber total of 45,819 with the correct household count of 176,208 allows us to conclude that Continental serves 26 percent of the households in franchise area CA1267. Based on this evidence, we find that Continental is subject to effective competition in franchise area CA1267.[18]

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[17] We derived this total by subtracting the 1,331 "commercial units" and the 32 "hotel/motel units" from the 104,965 "total FCC units" that were listed in the September report for franchise area CA0808.

[18] In opposing Continental's petition with respect to franchise area CA1267, the City does not dispute Continental's stated penetration level of 24.5%. Rather, the City questions the premise of our rules regarding the penetration level by suggesting that a penetration level below 30 percent, as set forth in our rules (47 C.F.R. § 76.905(b)(1)), is

9. In conclusion, we find that Continental has not demonstrated that it is subject to effective competition in franchise area CA0808. However, it has demonstrated that it is subject to effective competition in franchise area CA1267. Thus, its petition is denied in part and granted in part.

III. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that the petition for reconsideration filed by American Cablesystems of California, Inc. challenging the certification of the City of Los Angeles to regulate rates in the franchise area designated as FCC Community ID No. CA0808 **IS DENIED**.

11. **IT IS FURTHER ORDERED** that the automatic stay of rate regulation in franchise area CA0808 initiated by American Cablesystems of California, Inc.'s petition pursuant to Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) **IS TERMINATED**.

12. **IT IS FURTHER ORDERED** that American Cablesystems of California, Inc. shall file the required rate justifications for franchise area CA0808 on the applicable forms with the City of Los Angeles within thirty days of the release date of this *Memorandum Opinion and Order* or within thirty days of receipt of notice from the City of Los Angeles that it is regulating the rates of American Cablesystems of California, Inc., whichever is later.

13. **IT IS FURTHER ORDERED** that the petition for reconsideration filed by American Cablesystems of South Central Los Angeles, Inc. challenging the certification of the City of Los Angeles to regulate rates in the franchise area designated as FCC Community ID No. CA1267 **IS GRANTED**.

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not an accurate measure of effective competition since the City is served by only one cable operator. However, the 30 percent penetration standard is one of the three statutory tests Congress established for determining the presence of effective competition. As Continental correctly argues, the Commission does not have the discretion to impose rate regulation on a cable operator that meets one of the statutory tests.

14. **IT IS FURTHER ORDERED** that the certification of the City of Los Angeles to regulate the basic cable rates of American Cablesystems of South Central Los Angeles, Inc. **IS RESCINDED**.

15. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones

Meredith J. Jones
Chief, Cable Services Bureau

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DA 94-1571

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELLSOUTH'S AMENDMENT TO ITS SECTION 214 APPLICATION

FILE NO. W-P-C-6977

Released: December 23, 1994

On December 21, 1994, BellSouth Telecommunications, Inc. (BellSouth) filed an amendment to its Section 214 application for authority to construct and operate an integrated broadband network to conduct a market, economic, and technical trial of analog channel service and digital video dialtone service in the City of Chamblee, Georgia and adjacent communities in DeKalb County, Georgia. The application was initially filed on June 27, 1994.

Interested parties are invited to file comments or reply comments on the amendment only. Comments should be filed by **January 10, 1995**, and reply comments should be filed by **January 20, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Three copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the amendment can be obtained from ITS at (202) 857-3800. The amendment is available for review and photocopying at the FCC Public Reference Room, 6th Floor, 2025 M Street, N.W., Washington, D.C., from 8:30-12:30 and 1:30-3:00, Monday through Thursday.

We will continue to treat this proceeding as non-restricted for purposes of the Commission's ex parte rules. See generally 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

- FCC -

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

United and Central Telephone Companies Revisions to Tariff F.C.C. No. 1 — Transmittal No. 22

ORDER

Adopted: December 29, 1994; Released: December 30, 1994

By the Deputy Chief, Tariff Division, Common Carrier Bureau:

1. On November 14, 1994, the United and Central Telephone Companies (United and Central) filed Transmittal No. 22 to revise their Tariff F.C.C. No. 1. In Transmittal 22, United and Central create a common rate structure and regulations for 44.736 Mbps (DS3) high capacity channel termination and entrance facility services and establish common rate levels for customers in states where United and Central territories coincide. Tr. 22 Description and Justification (D&J) at 1. Specifically, United and Central propose to modify tariff language to: eliminate disparities in the application of DS3 high capacity rates between the United and Central territories; restructure rate elements to implement a three-tier pricing structure for DS3 high capacity services; and reconcile rate levels in specific territories where United and Central operations exist in common. Tr. 22 D&J at 2-3. Transmittal 22 is scheduled to become effective on December 31, 1994.

2. United and Central note that the revisions in Transmittal 22 will have implications for their regulation under price caps. *Id.* at 4-5. Previously, on October 3, 1994, the United Telephone Companies had submitted a letter to the Commission revising its price cap indices (PCIs) to include the effects of accounting for postretirement benefits other than pensions (OPEBs), as required by "Statement of Financial Accounting Standards" (SFAS) No. 106.[1] Transmittal 22 incorporates the revised PCIs as described in the October letter for United. However, the PCIs referenced by the Central Telephone Companies in Transmittal 22 are identical to those reflected in United and Central's Transmittal No. 14, the companies' most recent tariff filing. Thus, Transmittal 22 only takes into account PCI adjustments made by United in October; Central's PCIs remain the same.

3. MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate Transmittal 22 on November 29, 1994,[2] to which United and Central replied on December 8.[3] In its petition, MCI contends that the United and Central filing violates Section 61.49(a) of the rules, 47 C.F.R. § 61.49(a), because it reflects adjusted PCIs but omits sufficient cost support to allow the public to calculate the PCI adjustments. MCI Petition at 1. According to MCI, all local exchange carriers (LECs) subject to the price caps rules must explain their PCI adjustments in tariff filings by including material sufficient to permit the Bureau and interested parties to review the PCI calculations for accuracy. *Id.* at 3. MCI states that the PCIs in Transmittal 22 have been increased from the PCIs reported in United and Central's most recent price cap filing, Transmittal 14, to equal the PCIs established in the October letter. MCI argues that United has violated Section 61.49(a) by failing to include material sufficient to support the increased PCIs with its tariff filing. *Id.* at 3.

4. In its reply, United and Central assert that in Transmittal 22 only the PCIs for United are different from the PCIs reflected in Transmittal 14; Central's PCIs in Transmittal 22 are identical to those PCIs in Transmittal 14. United and Central Reply at 1. Moreover, United and Central reject MCI's characterization of the requirements of Section 61.49. According to United and Central, United's October 3 letter merely notified the Commission of the PCI adjustments for United. These PCI adjustments were not accompanied by rate changes or tariff modifications at that time, therefore, a tariff transmittal was not required to document the PCI adjustments. Similarly, United and Central contend that since the PCI adjustments do not affect the rates or rate structure modifications proposed in Transmittal 22, United and Central are not required to include information with the filing sufficient to support the PCI adjustments in Transmittal 22. *Id.* at 2.[4]

5. The Tariff Division has reviewed United and Central Transmittal No. 22 and the related pleadings. We conclude that no compelling argument has been presented that the United and Central tariff revisions are patently unlawful so as to require rejection, and that an investigation is not warranted at this time. Further, as United and Central have not introduced any rate increase predicated upon the PCI adjustment it described in its letter of October 3, 1994,[5] we

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[1] *See* October 3, 1994 letter to William F. Caton, Acting Secretary, FCC, from William F. Wardwell, Vice President, Service Costs and Pricing, Local Telecommunications Division, Sprint/United Management Company.

[2] Although MCI's petition erroneously refers to "Sprint Transmittal No. 22," in fact, the transmittal was filed by the United and Central Telephone Companies.

[3] On December 5, 1994, MCI sent a letter to William F. Caton, Acting Secretary, FCC, urging the Commission to apply the same level of review to United and Central Transmittal 22 that it applied to AT&T Transmittal No. 7322. *See* In the Matter of AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 7322, Memorandum Opinion and Order Suspending Rates, CC Docket No. 94-139 (DA 94-1327), released Nov. 28, 1994. This letter, which was submitted six days after the conclusion of the pleading cycle established by Section 1.773 of rules, 47 C.F.R. §1.773, constitutes a late-filed request for Commission action on this transmittal. Therefore, we dismiss it as untimely filed.

[4] Although United and Central maintain that Section 61.49(a) does not require the filing of information sufficient to calculate the PCI adjustments at this time, the companies filed an amended Transmittal 22 on December 14, 1994, which includes additional information to support the PCI adjustments. The supporting material filed by United and Central in the amended transmittal is identical to material provided by United in its October letter to the Commission detailing its exogenous cost treatment for OPEBs and the resulting PCI adjustments.

[5] Any rate revisions predicated upon the PCI adjustments

conclude that there is no reason to suspend and investigate Transmittal No. 22 because of the exogenous cost claims described in the October letter.[6]

6. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate United and Central Telephone Companies' revisions to Tariff F.C.C. No. 1, Transmittal No. 22, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Deputy Chief, Tariff Division
Common Carrier Bureau

proposed in United's October letter would, of course, have to comply with the requirements of Section 61.49, 47 C.F.R. § 61.49.

[6] *Cf.* In the Matter of Bell Atlantic Telephone Companies, et al., CC Docket No. 94-157, Memorandum Opinion and Order, DA 94-1613, released Dec. 29, 1994.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Revocation

FLORIDA CABLEVISION
MANAGEMENT, CORP.
D/B/A CABLEVISION INDUSTRIES

of Certification of
Collier County, Florida
to Regulate Basic Cable Service Rates
(FL0107, FL0577)

MEMORANDUM OPINION AND ORDER

Adopted: December 29, 1994; Released: December 30, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On March 4, 1994, Cablevision Industries ("CVI") filed a petition for revocation challenging the certification of Collier County, Florida ("Collier") to regulate rates for basic cable service and associated equipment.[1] On March 31, 1994, Collier filed an opposition to CVI's petition for revocation. Collier submitted a supplement to its opposition, dated August 9, 1994, pursuant to a recent Commission order.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7] Once the period for filing petitions for reconsideration has elapsed, cable operators may challenge a franchising authority's certification by filing a petition for revocation.[8] Regardless of the grounds, however, the filing of a petition for revocation does not automatically trigger a stay of a franchising authority's ability to regulate basic cable rates.[9]

II. DISCUSSION

Effective Competition Claim

3. CVI argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in the unincorporated areas of Collier County, its franchise area.[10] Specifically, CVI claims that it serves 16,915 of the 74,313 "households" it claims exist in its franchise area, or 22.76 percent of the total number of "households." As supporting documentation, CVI provides housing information supplied by the Collier County Long Range Planning Department which indicates a 1990 figure of 78,661 total "housing units" in the unincorporated areas of Collier County, and projects future housing statistics based on 1990 figures and growth rates that CVI has calculated.[11] Without explanation, CVI subtracts 1990 housing figures for three communities, apparently within its franchise, that CVI does not serve. Consequently, it arrives at a 1990 housing figure of 63,319 "households." CVI adjusts this reduced household figure by using a claimed 17.36 percent growth rate for housing units in Collier County between 1990 and 1993. This adjustment results in a 1993 estimate of 74,313 "households." CVI also submits a computer print-out from its database which indicates that there are 18,164 subscribers in the franchise area. In its petition, CVI subtracts subscriber data for Estero (1,249) from this

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[1] Collier filed its "Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition" on October 4, 1993, which became effective on November 3, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) ("*Effective Competition Order*").

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b); *see also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] 47 C.F.R. § 76.914.

[9] 47 C.F.R. § 76.914(d).

[10] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2) and the Commission rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable operator will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of a cable system. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[11] CVI is only franchised to operate in the unincorporated areas of the county.

total because it claims that Estero is not located in Collier County.[12] Thus, CVI claims that it serves 16,915 subscribers. Finally, CVI provides a copy of the franchise agreement, maps of its service area, and an affidavit under penalty of perjury by a responsible official certifying the accuracy of the data included in the petition.

4. As a preliminary matter, we note that CVI apparently failed to calculate its number of households in a manner that is consistent with our rules. CVI deducted, without explanation, the 1990 figures for three communities, apparently within its franchise, which CVI does not serve. We remind CVI that our rules require that the "low penetration" effective competition test must be demonstrated on the basis of the total number of households within the franchise area. The only exception to this general rule is where a franchising authority has demonstrated that a cable operator has made an affirmative decision to redefine its franchise area. *See e.g., First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 4316, 4324 (1993). We will accept CVI's figures, however, because they do not benefit CVI's claim of low penetration. Rather, they serve to increase CVI's calculation of penetration by reflecting a smaller franchise area than CVI is entitled to.

5. Nonetheless, even if we accepted CVI's housing calculation, we would still find that it has failed to meet its burden of demonstrating the presence of effective competition. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[13] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[14] CVI has failed to meet this burden. Specifically, CVI relied on data from the Collier County Long Range Planning Department, but failed to provide any clear indication of whether this data properly excludes vacant housing units. In order to demonstrate the presence of effective competition, our rules require the use of data reflecting the number of households (*i.e.*, occupied housing units) in the franchise area. *See Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units or even partial-year vacant units." The term "households" is defined for purposes of the 1990 Census to include only occupied housing units. Here, CVI submits no evidence clarifying whether its use of housing data excludes vacant housing units. As CVI has failed to submit evidence demonstrating that its effective competition claim is based on "households" its petition is denied.

6. As CVI has failed to meet its burden of demonstrating the presence of effective competition, we will deny its petition. However, should CVI wish to submit more specific information to support its effective competition claim, it may do so by filing a petition for revocation pursuant to Section 76.914 of the Commission's rules, 47 C.F.R. § 76.914.

OTHER MATTERS

7. In its response, Collier claims that CVI's effective competition is inappropriately based on areas unserved by CVI's cable system. First, Collier argues that CVI has made an affirmative decision to redefine its service area. Specifically, it states that CVI's actual service area is limited to specific communities in Collier County despite the fact that the franchise agreement does not restrict service to these specific unincorporated areas. Collier also states that CVI has elected not to expand or overbuild its system even though it specifically requested, and was granted a franchise in 1987 that overlaps with the franchise of another cable operator. Collier further argues that figures for "saturation" contained in CVI's petition indicate that CVI's penetration rate is actually 55 percent in Immokalee and 86 percent in Golden Gate, two communities within CVI's franchise area. As supporting documentation, Collier provides maps of the franchise area and CVI's area of actual service, a copy of the franchise agreement, and a report from an official cable television directory to which CVI reported "saturation" levels that exceed 30 percent. However, Collier does not submit any statements from CVI demonstrating its unwillingness to expand, or any proof of CVI's refusal to expand in response to specific requests. In light of our ruling that CVI has not submitted sufficient evidence to support its effective competition claim, we will not address the County's arguments at this time.

III. ORDERING CLAUSES

8. Accordingly, IT IS SO ORDERED that the petition for revocation filed by Cablevision Industries challenging the certification of Collier County, Florida to regulate basic cable rates IS DENIED.

9. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[12] Estero is actually in Ft. Myers County. *See* Rand McNally Commercial Atlas & Marketing Guide (1994) 125th edition.
[13] 47 C.F.R. § 76.906.
[14] 47 C.F.R. § 76.911(b)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS OF
MICHIGAN, INC.

Petition for Reconsideration

of the Certification of
Lake Township, Michigan,
to Regulate Basic Cable Service Rates
(MI0536)

MEMORANDUM OPINION AND ORDER

Adopted: December 29, 1994; Released: December 30, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On February 15, 1994, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely petition for reconsideration challenging the certification of Lake Township, Michigan, ("Lake") to regulate rates for basic cable service and associated equipment.[1] In addition, C-TEC filed a supplement to its original petition, pursuant to a recent Commission Order.[2] Finally, C-TEC filed a response to the Bureau's request for clarifying information regarding subscriber data contained in its petition and supplement.[3] Lake did not file an opposition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[4] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[5] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification 30 days from the date such certification becomes effective.[7] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[8]

II. DISCUSSION

3. C-TEC argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Lake Township, Michigan, its franchise area.[9] C-TEC's supplement indicates that it serves only 208 of the 766 occupied housing units in the franchise area, or 27.1 percent of the total number of occupied housing units. As supporting documentation, C-TEC submits the relevant page from the 1990 Census[10] which indicates that there are 766 occupied housing units in Lake Township. In addition, C-TEC provides a computer printout with sufficient information to demonstrate that C-TEC has 208 subscribers.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within its franchise area.[12] Based on the evidence, we find that C-TEC has met this burden. C-TEC appropriately relied on data reflecting the number of households as required by our rules.[13] Relying on this data, C-TEC has submitted sufficient evidence that its system serves 208 of the 766

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[1] Lake Township filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition on January 21, 1994. Its certification became effective on February 20, 1994.

[2] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[3] Letter to Jacqueline P. Cleary, counsel for C-TEC (November 25, 1994).

[4] Communications Act of 1934 § 623 (a)(4), 47 U.S.C. § 543 (a)(4).

[5] 47 CFR § 76.906, 76.910(b)(4).

[6] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is not subject to effective competition. 47 C.F.R. § 76.910(b). *See* also 47 U.S.C. § 543(a)(4).

[7] 47 C.F.R. §§1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[8] 47 C.F.R. § 76.911(c).

[9] The Cable Act (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)) and the Commission's rules (47 C.F.R. § 76.905 (a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the system. Communications Act of 1934, § 623 (l)(1)(A), 47 U.S.C. § 543 (l)(1)(A); 47 C.F.R. § 76.905 (b)(1).

[10] As the Bureau has stated recently, 1990 Census data is an appropriate source for household data. *Effective Competition Order*, *supra*.

[11] 47 C.F.R. § 76.906.

[12] 47 C.F.R. § 76.911(b)(1).

[13] *See Third Recon. Order*, *supra*.

households,[14] or 27.1 percent of the households in its franchise area. Thus, we find that C-TEC's system serving Lake Township, Michigan, is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by C-TEC Cable Systems of Michigan Inc., challenging the certification of Lake Township, (Missaukee County) Michigan, to regulate its basic cable service IS GRANTED.

6. IT IS FURTHER ORDERED that the certification granted to Lake Township (Missaukee County), Michigan, to regulate C-TEC Cable Systems of Michigan, Inc., basic cable rates IS RESCINDED.

7. This action is taken pursuant to delegated authority, Section 0.321 of the Commission's Rules, 47 CFR § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[14] We note that initially, in its petition C-TEC stated that there were 1,414 "homes" in its franchise area. This number was apparently based on the number of housing units in the franchise area. In its supplement, however, C-TEC submits occupied housing unit data. As C-TEC's supplement includes the correct type of housing data, we have relied on it for our analysis.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

King Videocable Company CUID No. CA0267
Jackson, California

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1994; Released: January 3, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider a complaint about the price King Videocable Company ("King") was charging for its cable programming service ("CPS") tier in Jackson, California, CUID No. CA0267. King has attempted to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of King's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on King on December 23, 1993. The Commission received the complaint on December 27, 1993.

5. King attempted to justify its CPS price through an FCC Form 393 filed on January 26, 1994. King amended its justification on June 29, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

DISCUSSION

6. In its amended benchmark filing of June 29, 1994, King calculated a maximum permitted price for the CPS tier of $6.05 per month. However, King's actual price for the CPS tier was $6.10 per month. Thus, King has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of King's FCC Form 393, as amended, we have found the following errors:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, King did not correctly account for its income tax expense. By placing entries in these columns, King confirms that it is a tax-paying entity (i.e., a "C" corporation). However, King incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a per-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent King has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which King implemented its CPS price under the new regulations. See para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in King's prices for the period after May 14, 1994 may be required to reflect the fact that King's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. 47 C.F.R. §76.922(b)(4)(c).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

centage of return on investment plus tax).[12] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. In Column D of Schedule C of Part III of its FCC Form 393, King incorrectly entered negative deferred taxes. We therefore recalculate Column D of Schedule C (and subsequent steps) using amounts which were adjusted to zero.

7. While these errors should not have been made, correction of these errors does not have the net effect of changing the maximum permitted monthly CPS tier price of $6.05 as calculated by King.

CONCLUSIONS

8. Upon review of the record herein, we conclude that King's showing supports a maximum reasonable CPS tier price of $6.05 per month (plus franchise fee) for the period December 27, 1993 to May 14, 1994. However, we further determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund.

9. We further conclude that King must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that King's prices during the earlier period were unreasonable.[13] We reserve the right to make further adjustments to King's prices for the period after May 14, 1994 upon completion of our review of King's FCC Form 1200 rate filing.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the December 23, 1993 complaint against the cable programming service price charged by King Videocable Company in Jackson, California, CUID No. CA0267, IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED, that the benchmark filing submitted by King Videocable Company with respect to Jackson, California, CUID No. CA0267, for the period of December 27, 1993 to May 14, 1994, justifies a maximum price of $6.05 per month (plus franchise fee) for the cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(c) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(c), that King Videocable Company shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Jackson, California, CUID No. CA0267, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted rate (plus franchise fee).

13. IT IS FURTHER ORDERED, that King Videocable Company shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[12] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation.") *See also Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.")

[13] We reviewed King's FCC Form 1200 rate filing and confirmed that King calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

King Videocable Company CUID No. CA0933
Valley Springs, California

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1994; Released: January 3, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider a complaint about the price King Videocable Company ("King") was charging for its cable programming service ("CPS") tier in Valley Springs, California, CUID No. CA0933. King has attempted to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of King's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on King on December 23, 1993. The Commission received the complaint on December 27, 1993.

5. King attempted to justify its CPS price through an FCC Form 393 filed on January 26, 1994. King amended its justification on June 30, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally[11] and on December 27, 1994 in response to an inquiry by the Commisison.[12]

DISCUSSION

6. In its amended benchmark filing of June 30, 1994, King calculated a maximum permitted price for the CPS tier of $6.41 per month. However, King's actual price for the CPS tier was $6.46 per month. Thus, King has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of King's FCC Form 393, as amended, we have found the following errors:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, King did not correctly account for its income tax expense. By placing entries in these columns, King confirms that it is a tax-paying entity (i.e., a "C" corporation). However, King incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent King has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which King implemented its CPS price under the new regulations. See para. 3, *infra*. Further, to the extent that the price for the period ending May 14, 1994 is found to be excessive, a reduction in King's price for the period after May 14, 1994 may be required to reflect the fact that King's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[12] Facsimile from Estella Salvatierra to John I. Davis, Esq., Wiley, Rein & Fielding (December 27, 1994).

Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[13] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. In Column D of Schedule C of Part III of its FCC Form 393, King incorrectly entered negative deferred taxes. We therefore recalculate Column D of Schedule C (and subsequent steps) using amounts which were adjusted to zero.

7. While these errors should not have been made, correction of these errors does not have the net effect of changing the maximum permitted monthly CPS tier price of $6.41 as calculated by King.

CONCLUSIONS

8. Upon review of the record herein, we conclude that King's showing supports a maximum reasonable CPS tier price of $6.41 per month (plus franchise fee) for the period December 27, 1993 to May 14, 1994. However, we further determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund.

9. We further conclude that King must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that King's prices during the earlier period were unreasonable.[14] We reserve the right to make further adjustments to King's prices for the period after May 14, 1994 upon completion of our review of King's FCC Form 1200 rate filing.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the December 23, 1993 complaint against the cable programming service price charged by King Videocable Company in Valley Springs, California, CUID No. CA0933, IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED, that the benchmark filing submitted by King Videocable Company with respect to Valley Springs, California, CUID No. CA0933, for the period of December 27, 1993 to May 14, 1994, justifies a maximum price of $6.41 per month (plus franchise fee) for the cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that King Videocable Company shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Valley Springs, California, CUID No. CA0933, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted rate (plus franchise fee).

13. IT IS FURTHER ORDERED, that King Videocable Company shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price for the CPS tier that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[13] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation.") *See also Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.")

[14] We reviewed King's FCC Form 1200 rate filing and confirmed that King calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Cable TV

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1994; Released: January 3, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the prices Century Cable TV ("Century") charges for its cable programming service ("CPS") tiers in numerous communities around the country (the "subject communities"). *See* Appendix for a list of the subject communities and the number of basic and CPS channels Century offered in each community both before and after September 1, 1993. Rather than attempting to justify its prices through a benchmark or cost of service showing, Century responded to the complaints by stating that it has no CPS tier in those systems. On December 21, 1994, Century submitted rate cards and channel line-up cards in support of its claim that CPS tiers no longer exist in any of the subject communities.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[1] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[2] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[3] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[4]

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[9]

BACKGROUND

4. The Cable Services Bureau has released orders resolving letters of inquiry ("LOIs") regarding Century's systems in Huntington, West Virginia; Morgantown, West Virginia; Muncie, Indiana; Owensboro, Kentucky; Yuma, Arizona; Brunswick, Georgia; and San Juan, Puerto Rico.[10] Relying on the Commission's *Going Forward Order*,[11] the Bureau's orders addressed the restructured service offerings implemented in these communities beginning September 1, 1993, in which Century eliminated its CPS tiers and offered instead only a basic service tier and a few a la carte channels. In each of these orders, the Bureau found that Century's restructured service offerings do not constitute a clear evasion of our rate rules. Specifically, the Bureau found that Century did not avoid rate regulation of most of its previous CPS channels because it moved those channels into a rate-regulated basic tier. With regard to the other channels, the orders permit Century to treat its a la carte packages as new product tiers that may be priced at market levels under the *Going Forward Order*.

5. Since the LOI orders found that the elimination of Century's CPS tiers does not constitute a clear evasion of rate regulation and those channels not placed on the basic service tier could be treated as a new product tier, there were no CPS tiers in those communities, as of September 1, 1993, that were subject to rate regulation pursuant to Section 76.922 of our rules. Therefore, the Bureau dismissed all FCC Form 329 complaints filed against Century in each of those seven communities.[12]

DISCUSSION

6. The rate cards and channel line-up cards submitted by Century for each of the subject communities indicate that Century restructured its service offerings in the subject communities on September 1, 1993 in essentially the same way that it did for the seven areas mentioned above where LOI orders have been issued. Specifically, Century discontinued its CPS offerings and placed all of its channels into a single basic service tier, except for a few channels

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).
[2] 47 C.F.R. § 76.956.
[3] 47 C.F.R. § 76.956(b).
[4] *Id.*
[5] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).
[6] *See Second Order on Reconsideration* at 4119 ; 47 C.F.R. § 76.922(b).
[7] *See Second Order on Reconsideration* at 4190, paras. 150-152.
[8] *Id.*
[9] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.
[10] *See* DA 94-1314; DA 94-1358; DA 94-1354; DA 94-1361; DA 94-1360; DA 94-1426; DA 94-1530.
[11] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286, ¶ 51 (adopted November 10, 1994).
[12] *See* DA 94-1422; DA 94-1530; DA 94-1531.

which it offered on an a la carte basis. In the subject communities, Century offered three to six a la carte channels. Likewise, Century's a la carte offerings consisted of three to six channels in the above-mentioned areas where LOI orders have been issued.

7. We feel that we have sufficient information regarding Century's restructured offerings in the subject communities to conclude, in accord with the *Going Forward Order*, that they should be treated the same way that we treated Century's restructured offerings in the seven communities where we issued LOI orders. As in these latter communities, although the instant restructuring resulted in the elimination of Century's CPS tiers, the small number of channels that were offered in the a la carte packages did not constitute an evasion of our then existing rules. Therefore, consistent with the action taken in the LOI orders, we will allow Century to treat its a la carte packages in the subject communities as new product tiers even though they would not qualify as new product tiers under the *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a CPS tier. Since there are no longer any CPS rates subject to regulation, we need not rule on the FCC Form 329 complaints pending against Century in these communities.

CONCLUSION

8. Accordingly, IT IS ORDERED that the a la carte packages created by Century Cable TV in the communities listed in the attached Appendix may be treated as new product tiers under our *Going Forward Order*.

9. IT IS FURTHER ORDERED that all FCC Form 329 complaints pending against the CPS rates of Century Cable TV in each of the communities listed in the attached Appendix are DISMISSED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

APPENDIX

CUID	Community	8/31/93 *Pre-Regulation* Basic	Tiers	9/1/93 *Post Regulation* Basic	Tiers	A la Carte
AL0025	City of Enterprise	11	22	29	0	3
AZ0019	City of Yuma	14	17	28	0	3
CA0117	Town of Yucca Valley	14	18	29	0	3
CA0018	City of La Habra	24	14	32	0	6
CA0016	City of Brea	27	14	38	0	6
CA0579	City of Redondo Beach	14	17	32	0	4
CT0110	Town of Old Lyme	17	16	29	0	4
CT0039	Town of Norwich	19	13	29	0	3
GA0119	County of Glynn	24	32	50	0	6
MS0024	City of Indianola	13	19	29	0	3
MS0021	City of Greenwood	13	22	32	0	3
NC0020	City of Laurinburg	14	16	27	0	3
NM0093	Village of Hatch	10	11	17	0	4
NM0085	County of Los Alamos	12	19	30	0	3
NM0013	City of Lovington	18	19	34	0	3
NM0022	City of Tucumcari	13	19	30	0	3
OH0100	City of Portsmouth	17	17	31	0	3
OH0400	Township of Brookfield	14	20	29	0	5
PA1439	City of Farrell	14	20	29	0	5
PA0485	City of Hermitage	14	20	29	0	5
PA0486	City of Sharon	14	20	29	0	5
PA0487	Borough of Sharpsville	14	20	29	0	5
PA2507	Township of Shenango	14	20	29	0	5
SC0010	City of Hartsville	14	19	30	0	3
WI0142	City of Waukesha	21	20	38	0	4
WI0350	Town of Pewaukee	21	20	38	0	4
WI0352	City of Port Washington	21	19	37	0	4
WI0131	City of Wauwatosa	21	20	38	0	4
WV0126	County of Cabell	15	18	30	0	3

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions
for Expanded Interconnection for
Special Access

Pacific Bell Transmittal No. 1765
Revisions to Tariff F.C.C. No. 128

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 1995; Released: January 9, 1995

By the Acting Chief, Tariff Division:

1. On December 9, 1994, Pacific Bell filed Transmittal No. 1765 to revise its Tariff F.C.C. No. 128. Specifically, Transmittal No. 1765 would revise certain rates for expanded interconnection service for physical collocation at Pacific Bell's SCRMCA01 and SNJSCA12 wire centers. Pacific Bell states that the purpose of these revisions is to allow a customer who wishes to collocate in SCRMCA01 to do so as quickly as possible, while paying the lower charges filed in Transmittal No. 1765.[1]

2. Transmittal No. 1765 raises the same issues regarding cost allocation, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Tariff Order*.[2] Therefore, Transmittal No. 1765 is suspended for one day, following the effective date, and will be subject to the investigation initiated in the *Expanded Interconnection Tariff Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1765, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that Pacific Bell's application to advance the effective date of Transmittal No. 1765 and to file on less than the statutory notice IS GRANTED.

5. IT IS FURTHER ORDERED that Pacific Bell SHALL FILE tariff revisions within five business days of the release date of this Order to reflect this suspension.

6. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. Pacific Bell should cite the "DA" number of the instant Order as the authority for this filing.

7. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), Pacific Bell shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

[1] On January 3, 1995, Pacific Bell filed an application for special permission to advance the effective date of Transmittal No. 1765 and allow the transmittal to take effect on less than the statutory notice. We will grant this application.

[2] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

STAR CABLE ASSOCIATES

Petition for Revocation	(NC0588)
of Certification of	(NC0862)
Stokes County, North Carolina	(NC0867)
to Regulate Basic Cable Service	(NC0902)
Rates	

MEMORANDUM OPINION AND ORDER

Adopted: January 12, 1995; Released: January 12, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On January 24, 1994, Star Cable Associates ("Star Cable") filed a petition challenging the certification of Stokes County ("the County") to regulate rates for basic cable service and associated equipment. [1] The County did not file an opposition to StarCable's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[3] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition. [6] Once the 30-day period for filing petitions for reconsideration has elapsed, cable operators may challenge a franchising authority's certification by filing a petition for revocation. [7] Regardless of its grounds, however, a petition for revocation does not automatically trigger a stay of the franchising authority's power to regulate basic cable rates.[8]

II. DISCUSSION

3. In its petition, Star Cable states that its system serving portions of Stokes County is subject to effective competition because it serves fewer than 30 percent of the households within portions of Stokes County,[9] its franchise area.[10] Specifically, Star Cable states that it serves 1,918 of the 7,784 households (that is, occupied housing units)[11] in its franchise, or 24.6 percent of the total number of households. As supporting documentation, Star Cable provides 1990 Census data[12] which indicates that there are a total of

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[1] Star Cable filed a pleading styled as a "petition for reconsideration" on January 24, 1994. The County's certification, however, became effective on December 23, 1993. Thus, any petition for reconsideration challenging the County's certification must have been filed no later than January 23, 1994. See 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*) . Star Cable's petition, thus, was filed one day after the deadline for filing petitions for reconsideration has elapsed. Accordingly, we will treat Star Cable's pleading as a "petition for revocation."

[2] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulation; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] 47 C.F.R. § 76.914.

[8] 47 C.F.R. § 76.914(d).

[9] Star Cable is authorized to serve all unincorporated portions of Stokes County "not previously granted for cablevision service by King Communications." *See* State of North Carolina, County of Stokes, Local Franchising Agreement at Section IV. To Star's knowledge and belief, King Communications's franchise area is limited to the unincorporated areas of Yadkin Township. *See* Petition for Reconsideration at note 3.

[10] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the franchise area subscribe to the system's cable service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[11] Both the 1992 Cable Act and the Commission's rules require that the determination of effective competition be based on household data. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b). As the Commission stated recently, "we presume that Congress did not intend households to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (" *Third Recon. Order")* . The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, 1990 Census of Population and Housing, Summary Population and Housing Characteristics, North Carolina, Appendix B at B-8 ("1990 Census").

[12] As the Bureau stated recently, 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra*.

14,123 households in Stokes County. To calculate the number of households in its franchise area, Star subtracted the number of households within Danbury town (48), Walnut Cove town (426), and Yadkin Township (5,865). Yadkin Township includes both an incorporated area (containing 1,509 households) and an unincorporated area (containing 4,356 households). Danbury town and Walnut Cove town, while within the County limits, are separate incorporated areas that are not part of Star Cable's franchise area. The unincorporated areas of Yadkin Township fall within King Communications' franchise area and like the incorporated area of Yadkin Township are not within Star's franchise area.[13] As such, the calculation yielded a total of 7,784 households. Star Cable also submits a computer print-out with sufficient subscriber information to support its claim that it serves 1,918 subscribers in the franchise area. Finally, Star Cable provides an affidavit by a responsible official certifying the accuracy of the data included in the petition.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[14] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commissions rules, is present within the franchise area.[15] Star Cable has met this burden. Specifically, Star Cable appropriately relied on data reflecting the number of households as required by our rules.[16] Relying on this data, Star Cable has submitted sufficient evidence demonstrating that its cable system serving Stokes County, its franchise area, serves 1,918 of the 7,784 households in its franchise area in Stokes County, or 24.6 percent of the total number of households. Thus, we find Star Cable's system serving Stokes County is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for revocation filed by Star Cable Associates challenging the certification Stokes County to regulate basic cable rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of Stokes County to regulate Star Cable Associate's basic cable rates IS RESCINDED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[13] *See* note 9, *supra*. We note that King City, a sub-division within Yadkin township, is an incorporated jurisdiction and is not part of King Communications' franchise area. *See* 1990 Census, Appendix B at G-6. Therefore, the number of households within the entire Yadkin township are excluded from Star Cable's calculation of the total number of households in its franchise area.

[14] 47 C.F.R. § 76.906.

[15] 47 C.F.R. § 76.911(b)(1).

[16] *Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INSIGHT COMMUNICATIONS COMPANY
OF NEW YORK, INC.

Petition for Reconsideration

of the Certification of
Shelby County, Indiana,
to Regulate Basic Cable Service Rates
(IN0715)

MEMORANDUM OPINION AND ORDER

Adopted: January 12, 1995; Released: January 12, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 19, 1993, Insight Communications Company of New York ("Insight") filed a timely petition for reconsideration challenging the certification of Shelby County, Indiana, ("the County") [1] to regulate rates for basic cable service and associated equipment. On August 18, 1994, Insight filed a supplement to its original petition, pursuant to a recent Commission Order.[2] The County did not file an opposition to Insight's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[4] Such certification becomes effective 30 from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements. [5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

3. Insight argues that its system serving the unincorporated areas of Shelby County is subject to effective competition because the system serves fewer than 30 percent of the households within its franchise area.[8] Insight claims that it serves 103 of the 8,114 households (that is, occupied housing units)[9] in its franchise area, or 1.27 percent of the total number of households. As supporting documentation, Insight submits a copy of household data from the 1990 Census which indicates that there are a total of 14,761 households in Shelby County. To calculate the number of households in the unincorporated areas of Shelby County, Insight subtracted the number of households from the incorporated areas of Shelbyville (6,133), Morristown (359), and St. Paul (155). This yielded a total of 8,114 households in the franchise area. In addition, Insight provides a computer printout as of November 13, 1993, which indicates that it serves 283 subscribers.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[10] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within its franchise area. [11] Insight has met this burden. Specifically, Insight appropriately relied on data reflecting the

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[1] Shelby filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition on September 23, 1993. Its certification became effective on October 23, 1993.

[2] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[3] Communications Act of 1934 § 623 (a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is not subject to effective competition. 47 C.F.R. § 76.910(b). *See* also 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911. *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Cable Act (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 534 (a)(2)) and the Commission's rules (47 C.F.R. § 76.905 (a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of these basis by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the system. Communications Act of 1934 § 623 (l)(1)(A), 47 U.S.C. § 543 (l)(1)(A); 47 C.F.R. § 76.905 (b)(1).

[9] As the Commission noted recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994). The term "household" is defined by Census Bureau to include only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[10] 47 C.F.R. § 76.906.

[11] 47 C.F.R. § 76.911(b)(1).

number of households as required by our rules.[12] Relying on this data, Insight has submitted sufficient evidence demonstrating that its cable system serving the unincorporated areas of Shelby County serves 283 of the 8,114 households, or 1.27 percent of the households within its franchise area. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Insight Communications Company challenging the certification of Shelby County, Indiana to regulate its basic cable service IS GRANTED.

6. IT IS FURTHER ORDERED that the certification granted to Shelby County, Indiana to regulate Insight Communications Company's basic cable rates IS RESCINDED.

7. This action is being taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[12] *See Third Recon Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Meredith Cable Television of North Central Minnesota ("North Central Suburban") Blaine, Minnesota	CUID Nos. MN0370, MN0371, MN0372, MN0373, MN0374, MN0375, MN0376, MN0377, MN0378

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1994 Released: December 30, 1994

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price Meredith Cable, North Central Cable Administrator systems in Minnesota ("Meredith") was charging for its cable programming service ("CPS") tier in its North Central Suburban cable system, headquartered in Blaine, Minnesota, CUID Nos. MN0370 *et al.*[1] Meredith has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Meredith's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

PROCEDUARL MATTERS

4. The first valid CPS complaint was completed and served on Meredith on October 6, 1993; a refiled complaint was served on December 20, 1993.[12] The Commission received the refiled complaint on or about December 28, 1993.

5. Meredith filed its first FCC Form 393 filing for its North Central Suburban systems, headquartered in Blaine, Minnesota, CUID Nos. MN0370 *et al.*, on November 15, 1993. This filing was dated November 10, 1993 and signed on the same date. Meredith filed a revised Form 393 on March 24, 1994, the reason for which Meredith states in its cover letter: "... reflects certain information that came to Meredith's attention during the basic rate review process..." The cover letter for the revised filing was signed on March 22, 1994.

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[1] According to Meredith, CUID numbers MN0370 - 0376, and CUID number MN0378 together constitute a single cable system and have the same programming and rates. Facsimile from Seth A. Davidson of Fleischman and Walsh, L.L.P., Attorneys-of-Record for Meredith Cable, to David O. Ward (December 21, 1994). MN0377 and MN0378 constitute the Spring Lake Park area.

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Meredith has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Meredith implemented its CPS price under the new regulations. See para. 3, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[12] The complaint was dated December 20, 1993, and states that it was mailed to Meredith on that date. The single form 329 was filed by the North Central Suburban Cable Communications Commission, which is the consolidated franchising entity that has jurisdiction over all of the CUIDs covered by this Order. Under these circumstances we will consider December 20, 1993 as the service date.

DISCUSSION

6. Meredith asserts that its monthly CPS tier price of $14.10 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $14.15 as calculated in its most recent filing, dated March 22, 1994. Upon review, we have found no apparent errors that would require a recalculation of Meredith's maximum permitted CPS price.

CONCLUSIONS

7. Upon review of the record herein, we conclude that Meredith has demonstrated that $14.10 per subscriber per month, plus franchise fee, was a reasonable CPS tier price for the period December 28, 1993 to May 14, 1994.[13]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service price charged by Meredith North Central Suburban Cable System of Blaine, Minnesota CUID Nos. MN0370 through MN0378, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by Meredith Cable (North Central Cable Administrator, Blaine, Minnesota), CUID Nos. MN0370 through MN0378, for the period December 28, 1993 to May 14, 1994, justifies a maximum price of $14.10 per month (plus franchise fee) for Meredith Cable's North Central Cable Administrator systems' cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Internal Revenue Service — AAD 94-152
Request to Inspect and Copy
Commission Records

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 1995; Released: January 10, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Internal Revenue Service (IRS) has requested that we allow IRS agents to inspect and copy files maintained by the Accounting and Audits Division. The files contain facts or information obtained during Commission audits, and the associated audit reports and workpapers, concerning certain common carriers for the period 1988 to present. The carriers have objected to disclosure pursuant to Section 0.442(d)(1) of the Commission's Rules.[1] Finding these objections without merit, we grant the IRS' request for disclosure, conditioned on the IRS' maintaining the same level of confidentiality as is required of the Commission.[2]

II. BACKGROUND

2. The IRS, through its auditing field agents, has requested that we allow IRS agents to inspect and copy certain files maintained by the Accounting and Audits Division for the period 1988 to present.[3] These files contain facts or information obtained during Commission audits, and the associated audit reports and workpapers, submitted in confidence to the Commission by the local exchange carriers owned by five holding companies: Ameritech Corporation, BellSouth Corporation, GTE Service Corporation, Southwestern Bell Corporation, and US West, Inc. (hereafter collectively referred to as "the LECs"). We notified the LECs of the disclosure request pursuant to Section 0.442(d)(1) of the Commission's Rules and afforded each ten days to respond.[4] All the LECs oppose disclosure.[5]

III. DISCUSSION

3. Section 3510 of the Paperwork Reduction Act of 1980 specifically allows federal government agencies, including the Commission and the IRS, to share information so long as such disclosure is not otherwise barred.[6] The requesting agency must afford the information the same protection that it received from the disclosing agency.[7] The Commission, however, generally will not release confidential information obtained from common carriers during audits performed by Commission staff.[8] This policy emanates from Section 220(f) of the Communication Act of 1934, as amended, which prohibits any Commission member, officer or employee from divulging facts and information derived in the course of an audit, except as directed by the Commission or a court.[9] In considering Section 3510, the Senate Committee on Government Affairs recognized the Commission's general concern that disclosure of confidential information to other agencies could harm the privacy rights of regulatees.[10] The Committee stated that information need not be shared "if the disclosure would be inconsistent with applicable agency policy."[11] The Commission has expressed its policy regarding requests for confidential records from other federal government agencies in Section 0.442 of its rules.[12]

4. Section 0.442(b) requires the Commission to disclose to federal agencies, such as the IRS, information submitted to the Commission in confidence provided that four conditions are met:

> (1) Specific Commission assurances against such disclosure have not been given,
>
> (2) the other agency has established a legitimate need for the information,

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[1] 47 C.F.R. §0.442(d)(1). *See* discussion, *infra* paras. 3-14.

[2] 44 U.S.C. §3510(b). *See infra* para. 3.

[3] Letter of Don Burkhart, Assistant Utilities ISP Specialist, Internal Revenue Service to Jose-Luis Rodriguez, Accounting and Audits Division, dated December 7, 1993 (*"IRS Letter"*). While the IRS originally requested to review the audit files for all of the Regional Bell Holding Companies and General Telephone and Electronics (GTE), it subsequently excluded Bell Atlantic Corporation, NYNEX Corporation and Pacific Telesis6)Group from its request.

[4] 47 C.F.R. §0.442(d)(1).

[5] *See* Letter of Fred K. Konrad, Director, Federal Relations, Ameritech Corporation, dated August 11, 1994 (*"Ameritech Letter"*); Letter of Maurice P. Talbot, Jr., Executive Director-Federal Regulatory, BellSouth, dated August 11, 1994 (*"BellSouth Letter"*); Letter of Gail L. Polivy, Senior Attorney, GTE Service Corporation, dated August 11, 1994 (*"GTE Letter"*); Letter of Karol M. Sweitzer, Director, Federal Regulatory, Southwestern Bell Corporation, dated August 11, 1994 (*"Southwestern Bell Letter"*); and Letter of G. Michael Crumling, Executive Director-Federal Regulatory, US West, Inc., dated August 15, 1994 (*"US West Letter"*).

[6] 44 U.S.C. §3510(a). By way of contrast, the Freedom of Information Act, 5 U.S.C. §552, governs public disclosure of agency records.

[7] 44 U.S.C. §3510(b).

[8] *See, e.g.*, GTE Telephone Operating Companies, Memorandum Opinion and Order, 9 FCC Rcd 2588 (1994); National Exchange Carrier Ass'n, Request for Confidential Treatment of Certain Financial Information, Memorandum Opinion and Order, 5 FCC Rcd 7184 (1990); Martha H. Platt, On Request for Inspection of Records, Memorandum Opinion and Order, 5 FCC Rcd 6458 (1990); Western Union Telegraph Company, On Request for Inspection of Records, Memorandum Opinion and Order, 2 FCC Rcd 4485 (1987).

[9] 47 U.S.C. §220(f) provides: No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

[10] S. Rep. No. 930, 96th Cong., 2d Sess. 50-51, 1980 U.S.C.C.A.N. (94 Stat.) 6241, 6290-91 (1980).

[11] *Id.*

[12] 47 C.F.R. §0.442.

(3) disclosure is made subject to the provisions of 44 U.S.C. 3508(a), and

(4) disclosure is not prohibited by the Privacy Act or other provisions of law.[13]

We discuss these conditions in turn below.

5. The first condition under Section 0.442(b) prohibits the disclosure of information that carriers submit in confidence to the Commission when specific assurances against disclosure have been given.[14] The Commission has given no such assurances to the LECs regarding any of the information requested by the IRS. In response to the notification of the IRS' request for disclosure, GTE has asked the Commission, pursuant to Section 0.442(c) of its rules,[15] for assurances that it will not disclose the information to the IRS.[16] Because GTE's arguments against disclosure, discussed *infra*, fail to override our determination that granting the IRS' request will serve the public interest,[17] we deny GTE's request for assurances against disclosure to the IRS.

6. The LECs claim that disclosure of the files would violate the second condition of Section 0.442(b) of the Commission's Rules, which requires that the requesting agency have a "legitimate need" for the information.[18] The IRS will use the requested information in discharging its Congressional mandate to enforce the Internal Revenue Code. We defer to the IRS' judgment in determining what information it needs to discharge that mandate. Certain LECs have challenged the disclosure request by arguing that the existence of alternative methods for the IRS to obtain the information demonstrates that the agency lacks a legitimate need for the contents of our files.[19] Their argument, though, targets the source of the information, not the need that the IRS has for the audit reports and associated documents contained in those files.

7. BellSouth also contends that "[i]f the Paperwork Reduction Act is read in conjunction with [Section 0.442(b)(2) of the Commission's Rules], it is apparent that there is no need for the IRS collection of the requested information from the FCC."[20] While BellSouth does not sufficiently explain the basis for its argument, it is clear that the Paperwork Reduction Act cannot be read in conjunction with Section 0.442(b)(2) of the Commission's Rules to provide a basis for challenging the legitimacy of the IRS' need for the files. Congress enacted that Act to eliminate wasteful and unnecessary federal paperwork that places a burden on the American public.[21] That Act applies to the "collection of information,"[22] that, in the context of requests made to other federal government agencies, includes only methods of obtaining "answers to questions posed to agencies, instrumentalities, or employees of the United States *which are to be used for general statistical purposes*".[23] The IRS has requested to inspect and copy files that contain facts and information about specific LECs. The request logically relates to the IRS' auditing activities surrounding these LECs, rather than to some general statistical purpose.

8. The third condition requires that any Commission release to another agency of information submitted in confidence be subject to the federal statutory requirement that the requesting agency give the information the same protection that it received from the Commission.[24] Thus, under Section 0.442(b)(3) of the Commission's rules,[25] all provisions of law, including penalties, related to the unlawful disclosure of information apply to the officers and employees of the requesting agency to the same extent and in the same manner as the provisions apply to Commission personnel.[26] Section 220(f) of the Communication Act of 1934, as amended, prohibits any Commission member, officer or employee from divulging facts and information derived in the course of an audit, except as directed by the Commission or a court.[27] Thus, the Commission's release of any facts or information about certain LECs obtained during Commission audits, and the associated audit reports and workpapers, to the IRS subjects the IRS to the provisions of Section 220(f). The IRS has already promised that it will "not make the information reviewed available to the public, and [will] observe all confidentiality criteria."[28] To comply with Section 0.442(b)(3), we expressly condition our grant of the IRS' request on the IRS maintaining the same level of confidentiality for the requested information as is required of the Commission.

9. Lastly, Section 0.442(b)(4) prevents the Commission from disclosing information to another agency if such disclosure would violate the Privacy Act[29] or other provisions of law.[30] Certain LECs contend that this condition prohibits us from granting the IRS' request.[31] BellSouth argues that the Privacy Act prevents the IRS' use of information provided to the Commission by BellSouth for a purpose

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[13] *Id.* §0.442(b).

[14] 47 C.F.R. §0.442(b)(1).

[15] *Id.* §0.442(c). Section 0.442(c) provides that "Commission staff may give assurances against disclosure of information to other federal agencies only with the prior written approval of the General Counsel." *Id.*

[16] *See GTE Letter* at 5.

[17] *See infra* para. 14.

[18] 47 C.F.R. §0.442(b)(2). *See Ameritech Letter* at 2; *BellSouth Letter* at 1-2; *GTE Letter* at 4; *US West Letter* at 1. Southwestern Bell objects to disclosure "pursuant to 47 C.F.R. §0.442," without discussing any specific condition. *See Southwestern Bell Letter* at 1.

[19] *See Ameritech Letter* at 1-2; *BellSouth Letter* at 1; *GTE Letter* at 4; *US West Letter* at 1. Without specifically arguing this point, Southwestern Bell points out that the IRS has failed to request access to the information in the audit reports directly from it. *See Southwestern Bell Letter* at 1.

[20] *See BellSouth Letter* at 1-2.

[21] 44 U.S.C. §3501.

[22] *Id.* §3507.

[23] *Id.* §3502(4) (emphasis added).

[24] 47 C.F.R. §0.442(b)(3). The Commission promulgated 47 C.F.R. §0.442 under the authority given by 44 U.S.C. §§3512 and 3508(a). Congress revised the statutory reference in 1980 to 44 U.S.C. §3510.

[25] 47 C.F.R. §0.442(b)(3).

[26] 44 U.S.C. §3510.

[27] 47 U.S.C. §220(f).

[28] *IRS Letter* at 1.

[29] 5 U.S.C. §552a.

[30] 47 C.F.R. §0.442(b)(4).

[31] Only BellSouth directly cites to 47 C.F.R. §0.442(b)(4), and it does so only for the purpose of arguing that disclosure would violate the Privacy Act of 1974, 5 U.S.C. §552a. *See Bellsouth Letter* at 2. All the LECs, though, claim that disclosure would violate other statutes and regulations, including the IRS' own Manual. *See Ameritech Letter* at 1-2; *BellSouth Letter* at 1; *GTE Letter* at 4; *Southwestern Bell Letter* at 1-2; *US West Letter* at 1.

other than that for which the information was originally obtained.[32] The Privacy Act, however, regulates the collection and use of information by federal government agencies in order to safeguard individuals, not businesses, from governmental invasions of privacy.[33] BellSouth further argues that this Act bars the Commission's release of any files that contain information that identifies an individual.[34] While the files include time reports[35] and other documents that identify individual employees acting in their employment capacities, the Privacy Act does not bar disclosure in this case. That Act only proscribes disclosure of information about an individual "which is contained in a system of records."[36] A "system of records" means records "from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual."[37] Thus, coverage under the Privacy Act depends not only upon the content of the record, but also the method of retrieval. The requested files contain paper records of facts and information obtained during Commission audits, and the associated audit reports and workpapers. Commission personnel can only retrieve facts and information from the requested files by carrier or holding company name. The inclusion of identifying personal information is merely incidental to our auditing activities. Disclosure therefore does not implicate Privacy Act concerns.

10. The Computer Matching and Privacy Protection Act (Matching Act), 5 U.S.C. §552a, amended the Privacy Act of 1974 to include a prohibition against certain types of computer comparisons of "systems of records" to protect identifying personal information contained therein. BellSouth argues that the Matching Act prohibits us from granting the IRS' request.[38] As with other provisions of the Privacy Act, the Matching Act does not apply to the particular files at issue because the IRS cannot retrieve any identifying personal information "by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual."[39] In addition, the IRS request fails to constitute a "matching program" under the Act. A "matching program" is a computerized comparison of two or more "automated" systems of records.[40] The IRS has requested specific non-automated files that contain paper copies of the facts or information obtained during Commission audits, and the associated audit reports and workpapers.

11. The LECs similarly contend that the Commission should deny disclosure because the request violates certain internal procedures set forth in Section 4083[41] of the IRS' own Manual.[42] To facilitate the securing of information in an orderly manner from federal government agencies without undue inconvenience to those agencies, Section 4083 directs the IRS National Office to serve as an agent for its auditing field personnel.[43] In this case, the request came directly from the IRS' field employees.[44] The Manual further provides that "[t]he information desired should first be requested from the taxpayer or his/her representative and documentation to this effect should be included in the audit workpapers."[45] The LECs claim that the IRS has failed to request any of the information contained in our files directly from them.[46] Enforcement of the IRS' own internal procedures, though, falls outside the scope of this Commission's jurisdiction.[47] Thus, the alleged violations of the Manual fail to constitute violations of "[a]nother provision of law" under Section 0.442(b)(4) of the Commission's Rules.[48]

12. Southwestern Bell also argues that disclosure would deny it "protection of its legal rights and a measure of due process" provided by the judicial enforcement of a summons issued pursuant to Section 7602(a)(2) of the Internal Revenue Code.[49] That subsection gives the IRS broad power to summon a taxpayer or any person having possession of books of account related to the business of the taxpayer "or any other person the Secretary may deem proper."[50] Under Section 7602(a)(1) of the Internal Revenue Code, however, the IRS has the authority, separate and apart from its summons power under Section 7602(a)(2), "to examine any books, papers, records, or other data which may be relevant or material" to its inquiry.[51] The mere fact that the IRS can obtain information by issuing a summons does not require it to follow that procedure,[52] rather than requesting disclosure pursuant to Section 0.442 of the Commission's Rules.[53] Indeed, that section, which gives the LECs notice of the IRS' request, an opportunity to object

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[32] *See BellSouth Letter* at 2.

[33] The Privacy Act of 1974 provides protection for an "individual" which it defines as "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. §552a(a)(2).

[34] See *BellSouth Letter* at 2.

[35] Time reports identify the time carrier employees spent performing specific employment duties. These reports allow the Commission to ensure carrier compliance with its accounting requirements.

[36] 5 U.S.C. §552a(b).

[37] *Id.* §552a(a)(5).

[38] *See BellSouth Letter* at 3.

[39] 5 U.S.C. §552a(b).

[40] *Id.* §552a(a)(8)(A).

[41] Internal Revenue Manual §4083.

[42] *See Ameritech Letter* at 1-2; *BellSouth Letter* at 1; *GTE Letter* at 4; *Southwestern Bell Letter* at 1-2; *US West Letter* at 1.

[43] Internal Revenue Manual §4083.1(2).

[44] *See IRS Letter* at 1.

[45] Internal Revenue Manual §4083.1(4).

[46] *See Ameritech Letter* at 1-2; *BellSouth Letter* at 1; *GTE Letter* at 4; *Southwestern Bell Letter* at 1-2; *US West Letter* at 1.

[47] Ameritech and BellSouth make additional arguments regarding IRS procedures that also fall outside the Commission's jurisdiction. First, Ameritech argues that because the IRS is currently auditing the carrier's income tax records for the years 1986-1989, the agency's request for information relating to matters examined in a taxpayer audit would be more properly addressed in its next audit cycle, scheduled to begin in the first half of 1995. *See Ameritech Letter* at 2. Second, BellSouth points to "[t]he IRS Privacy Principles, recently published at page 5 of the June 1, 1994 edition of the Privacy Times, [that] states that 'information will be collected, to the greatest extent possible, directly from the taxpayer to whom it relates.'" *See BellSouth Letter* at 1.

[48] 47 C.F.R. §0.442(b)(4).

[49] *See Southwestern Bell Letter* at 2, *citing* 26 U.S.C. §7602(a)(2).

[50] 26 U.S.C. §7602(a)(2).

[51] *Id.* §7602(a)(1).

[52] *See* U.S. v. Barksdale, 499 F. Supp. 624, 628 (M.D. Fla. 1980)).

[53] 47 C.F.R. §0.442.

to disclosure, and ten working days from the date of this Order to move for a judicial stay, amply protects the LECs' due process rights.[54]

13. Ameritech and GTE express concern that the Commission's release of information learned in the course of audits to other federal government agencies will undermine the spirit of cooperation between the carriers and the Commission.[55] The information that the Commission will disclose to the IRS, however, remains protected from public release.[56] As previously discussed, federal statutory law requires the IRS to safeguard the confidentiality of the audit reports to the same degree as the Commission.[57] Therefore, our release of the information to the IRS should not undermine the carriers' cooperative spirit.

14. Finding the four conditions of Section 0.442(b) of the Commission's rules satisfied, we grant the IRS' request to inspect and copy our files concerning the LECs for the period 1988 to present, conditioned on the IRS' maintaining the same level of confidentiality as is required of the Commission.[58] We believe that such disclosure will serve the public interest by helping the IRS enforce the Internal Revenue Code in accord with the procedures it believes will best meet this objective. Pursuant to Section 0.442(d)(4) of the Commission's Rules,[59] the LECs will receive ten working days in which to seek a judicial stay of this Order. Upon release of this Order, the Accounting and Audits Division of the Common Carrier Bureau will furnish notice by telephone to the LECs of the Commission's determination and of the time for seeking a judicial stay, as well as subsequent notice in writing.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 220(f) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 220(f), Section 3510 of the Paperwork Reduction Act of:1980, 44 U.S.C. §3510, and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the IRS' request for disclosure under Section 0.442 of the Commission's Rules, 47 C.F.R. §0.442, IS GRANTED, conditioned on the IRS' maintaining the same level of confidentiality as is required of the Commission.

16. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 220(f) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 220(f), Section 3510 of the Paperwork Reduction Act of 1980, 44 U.S.C. §3510, and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that GTE's request for assurance against disclosure to the IRS IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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[54] *Id.* §0.442(d)(4).
[55] *See Ameritech Letter* at 3; *GTE Letter* at 1.
[56] *See* 44 U.S.C. §3510(b).
[57] 44 U.S.C. §3510.
[58] *See supra* para. 8.
[59] 47 C.F.R. §0.442(d)(4).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Operating Companies'
Joint Petition for Waiver of Computer II Rules

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1995; Released: January 11, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 14, 1994, the Bell Operating Companies (BOCs) jointly filed a petition for an interim waiver of the Commission's *Computer II* rules (BOC Petition).[1] The BOC petition was precipitated by the opinion of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) in *California v. FCC* (*California III*) remanding in part the Commission's *BOC Safeguards Order*.[2] The *BOC Safeguards Order* had established a framework for lifting the structural separation requirements of *Computer II* that had governed BOC provision of enhanced services.[3] The BOCs seek a waiver, if deemed necessary by the Commission, to continue existing enhanced service offerings to consumers on an integrated basis,[4] to continue integrated enhanced service research, development, and market trials, and to offer new enhanced services associated with video dialtone on an integrated basis without obtaining prior Commission approval. Concern about the severe service disruptions that could occur for up to five million customers leads us to grant the BOC Petition in substantial part and to clarify the requirements that will govern BOCs' enhanced service offerings, pending further Commission action on remand.

2. Specifically, we conclude that, after the *California III* decision, the BOCs may generally provide enhanced services after complying with the Comparably Efficient Interconnection (CEI) plan regime in effect before the Commission completely lifted structural separation requirements.[5] We grant the BOCs a limited waiver to continue providing those enhanced services that they first offered after the CEI plan approval requirement had expired, conditioned on their filing CEI plans for those services within sixty days after the release of this order. We also grant the BOCs a limited waiver to continue existing market trials initiated after the expiration of the CEI plan approval requirement, conditioned on their filing market trial notifications within sixty days after the release of this order. To the extent that the *California III* decision might be regarded as returning regulation to the *Computer II* framework, we grant the BOCs limited waivers of the *Computer II* structural separation requirements, pending conclusion of remand proceedings.

3. Accordingly, we grant any necessary waivers to enable the BOCs to: (1) provide existing enhanced services pursuant to CEI plans approved prior to the lifting of structural separation; (2) continue providing other existing enhanced services, pending Commission consideration of CEI plans for those services; (3) file CEI plans for any new enhanced services; (4) continue to perform research and planning activities and technical trials for enhanced services; (5) continue existing market trials, conditioned on their filing the market trial notifications required under the CEI plan regime; and (6) begin market trials of new enhanced services pursuant to the market trial requirements of the CEI plan regime. We decline to treat video-dialtone-related enhanced services differently from other new enhanced services.

II. BACKGROUND

A. Commission and Court Decisions

4. *Computer II* generally required the BOCs to offer enhanced services through structurally separate subsidiaries, unless they obtained a waiver from the Commission.[6] In its *Computer III* decisions, the Commission permitted the BOCs to integrate their enhanced service and their

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[1] Joint Contingency Petition for Interim Waiver of the *Computer II* Rules (Nov. 14, 1994).

[2] California v. FCC, Nos. 92-70083, 92-70186, 92-70217, 92-70261, slip op. (9th Cir. Oct. 18, 1994) (*California III*).

[3] Basic services, such as "plain old telephone service" (POTS), are regulated as tariffed services under Title II of the Communications Act. Enhanced services use the existing telephone network to deliver services that provide more than a basic transmission offering, such as voice mail, E-Mail, electronic store-and-forward, fax store-and-forward, data processing, and gateways to online databases. *See* 47 C.F.R. § 64.702(a).

Under *Computer II*, BOCs could offer enhanced services only through structurally separate subsidiaries governed by detailed rules designed to prevent anticompetitive conduct. *See Computer II Final Decision*, 77 FCC 2d 384, 475, para. 233; *BOC Separation Order*, 95 FCC 2d 1117, 1120 (1983).

[4] By the term "integrated," we refer to the provision of enhanced services and basic services in a manner *not* consistent with the *Computer II* separation requirements. Under structural integration, BOCs have been able to offer enhanced services without establishing separate subsidiary companies, hiring separate personnel, or using separate computer equipment and other facilities. BOCs are still permitted to offer their enhanced services through subsidiaries, but those subsidiaries can share personnel and resources with the parent company.

[5] Under the CEI plan framework, BOCs were required to obtain prior Commission approval before offering any enhanced service on an integrated basis. For each enhanced service offering, a BOC had to submit a "CEI plan" that explained, among other things, how it would make available to competing enhanced service providers (ESPs) the basic network services underlying provision of that particular enhanced service. The Commission lifted this requirement following approval of BOC Open Network Architecture (ONA) plans. *See infra* paras. 6-8.

[6] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Computer II*), 77 FCC 2d 384, 428-40, paras. 114-18 (1980) (*Final Decision*), *recon.*, 84 FCC 2d 50 (1981)

basic service offerings, provided that the BOCs complied with certain nonstructural safeguards designed to prevent anticompetitive and discriminatory behavior.[7]

5. As a first step in implementing *Computer III*, the Commission permitted the BOCs, pending full structural relief, to offer individual enhanced services on an integrated basis following approval of service-specific CEI plans.[8] In their CEI plans, BOCs were required to describe: (1) the enhanced service or services to be offered, (2) how the underlying basic services would be made available for use by competing enhanced service providers (ESPs), and (3) how the BOC would comply with the other nonstructural safeguards *Computer III* imposed. Such other safeguards governed: timely disclosure to competing ESPs of network information, including technical interfaces; access to and use of customer proprietary network information (CPNI); and quarterly reporting to help ensure that BOC provision of basic services to competing ESPs was nondiscriminatory in terms of quality, installation, and maintenance. Market trials of enhanced services were also allowed pursuant to more limited filing requirements.[9]

6. *Computer III* concluded that, in the longer term, with the implementation of Open Network Architecture (ONA), the BOCs should be permitted to provide integrated enhanced services without prior Commission approval of service-specific CEI plans. The Commission ordered the BOCs to develop ONA plans under which the BOCs would unbundle elements of their networks and offer them to competing ESPs on a nondiscriminatory basis. In the *Computer III Phase I Order*, the Commission stated that once those ONA plans were approved, it would fully lift the *Computer II* structural separation requirements.[10]

7. In 1990, the Ninth Circuit vacated and remanded three of the Commission's *Computer III* orders on the basis that the Commission had not shown that its nonstructural guidelines adequately protect against improper cross-subsidization of enhanced services by the BOCs.[11] The Commission at that time issued an interim waiver permitting the BOCs to continue offering enhanced services on an integrated basis pursuant to their approved CEI plans. [12] In addition, the Commission reimposed ONA requirements on the BOCs independent of removing structural separation requirements.[13] In 1991, the Commission adopted the *BOC Safeguards Order*, which strengthened the safeguards criticized by the court in *California I*, and decided to lift *Computer II* structural separation requirements fully once BOC ONA plans were approved and implemented.[14]

(*Reconsideration Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Further Reconsideration Order*), *affirmed sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *see also* Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket No 83-115, *Report and Order*, 95 FCC 2d 1117, 1120, para. 3 (1984) (*BOC Separation Order*), *affirmed sub nom.* Illinois Bell Telephone Co. v. FCC, 740 F.2d 465 (1984), *affirmed on recon.*, FCC 84-252, 49 Fed. Reg. 26056 (1984) (*BOC Separation Reconsideration Order*), *affirmed sub nom.* North American Telecommunications Ass'n v. FCC, 772 F.2d 1282 (7th Cir. 1985).

The *Computer II* rules, as applied to the divested BOCs in the *BOC Separation Order*, permitted the BOCs to share some administrative functions, but required that separate subsidiaries maintain their own books of account, hire separate officers and operating personnel, and use computer equipment and facilities separate from those used to provide regulated services. *See Computer II Final Decision*, 77 FCC 2d 384, 475, para. 233; *BOC Separation Order*, 95 FCC 2d 1117, 1120 (1983). We note that when it originally imposed structural separation on the BOCs, the Commission gave the them more than seven months to comply with that requirement. *See BOC Separation Order*, 95 FCC 2d at 1150.

[7] Amendment of Section 64.702 of the Commission's Rules and Regulations, (*Computer III*), CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration, Phase I Order* and *Phase I Reconsideration Order vacated*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1988) (*Phase II Further Reconsideration Order*), *Phase II Order vacated*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied*, California v. FCC, 4 F.3d 1505 (9th Cir. 1993); Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *BOC Safeguards Order vacated in part*, California v. FCC, Nos. 92-70083, 92-70186, 92-70217, 92-70261 (9th Cir. Oct. 18, 1994).

[8] *Phase I Order*, 104 FCC 2d at 1034-58, paras. 142-200. The BOCs collectively have received approval for 29 CEI plans. If a BOC provides an enhanced service on a structurally separated basis, there is no CEI plan filing requirement.

[9] The Common Carrier Bureau adopted various restrictions for BOC market trials, including requirements that BOCs provide notification to the Commission 90 days before commencement of a market trial, that market trials operate for no longer than eight months, that BOCs provide competing ESPs with equal access to all basic network services used in the trial, and that BOCs observe CPNI and network disclosure rules. *See* BOC Notices of Compliance with CEI Waiver Requirements for Market Trials of Enhanced Services, 4 FCC Rcd 1266 (1989) (*BOC Market Trial Order*).

[10] *Phase I Order*, 104 FCC 2d at 1059-66, paras. 201-22.

[11] California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (*California I*). The court concluded that the Commission had not provided a sufficient explanation for its determination that cost allocation safeguards could effectively prevent cross-subsidization of competitive enhanced service offerings by regulated ratepayers. *Id.* at 1238-39. The court also vacated the sections of *Computer III* that preempted all state structural separation requirements and all inconsistent state nonstructural safeguards, on the grounds that the Commission had not demonstrated that such state regulation would negate federal interests. *Id.* at 1243-45

[12] Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, 5 FCC Rcd 4714 (1990) (*Structural Separation Waiver Order*). The *Structural Separation Waiver Order* granted an interim waiver to remain in effect until the Commission initiated further proceedings on remand. The Commission subsequently extended the duration of the waiver until the completion of the *California I* remand proceeding. *See Computer III* Remand Proceedings, 5 FCC Rcd 5242, 5243, para. 12 (1990).

[13] *Computer III* Remand Proceedings, 5 FCC Rcd 7719 (1990).

[14] Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*). The *BOC Safeguards Order* also preempted: (1) state requirements for structural separation of facilities and personnel used to provide the intrastate portion of jurisdictionally mixed enhanced services; (2) state CPNI rules requiring

8. In a series of orders between 1988 and the end of 1992, the Commission approved BOC ONA plans that described the unbundled basic services each BOC proposed to provide as ONA services and the terms under which they would be offered. During the 1992-1993 period, the Common Carrier Bureau approved the lifting of structural separation requirements for individual BOCs upon their showing that they had implemented all of the ONA services in their initial ONA plans. [15]

9. In 1993, the Ninth Circuit decided *California II*, which upheld the orders approving BOC ONA plans. [16] The *California II* court concluded that the Commission had scaled back its vision of ONA since *Computer III*, but that the issue of whether the lifting of structural separation was still justified was not properly before it. [17]

10. In *California III*, the Ninth Circuit upheld much of the *BOC Safeguards Order*.[18] The court upheld the Commission's findings that a regime of nonstructural safeguards adequately prevented improper cross-subsidization of enhanced services by the BOCs. The court also upheld the preemption elements of the *BOC Safeguards Order*.[19] Moreover, the court noted that *California I* had determined that the Commission had justified, in *Computer III*, the use of nonstructural safeguards such as ONA to prevent the BOCs from providing ESPs with inferior access to basic network services.[20] The court acknowledged that as an interim measure until ONA was implemented, CEI plans "ensured that enhanced services competitors were provided with interconnections with the BOCs' own networks that were substantially equivalent to the interconnections that the BOCs provided for their own enhanced services."[21]

11. Nonetheless, the court remanded that part of the *BOC Safeguards Order* lifting all structural separation requirements. The court found that the Commission had not adequately explained the decision to lift these requirements when the BOCs' approved ONA plans did not provide for fundamental unbundling of the BOC networks. According to the court, the Commission had found, in the original *Computer III Phase I Order*, that fundamental unbundling was necessary to protect against access discrimination in the absence of general structural separation requirements.[22] Under the Commission's interim CEI regime, "the BOCs could provide integrated enhanced services pending the unbundling of the networks" pursuant to individually approved CEI plans that ensured that the interconnections given BOCs and their competitors were "substantially equivalent."[23] In contrast, ONA was supposed to give competing ESPs the ability to "pick and choose" network service elements not used by the BOCs in providing their own enhanced services.[24] In the absence of an explanation from the Commission why it no longer regarded such fundamental unbundling as necessary to prevent access discrimination, the court found the Commission's overall cost benefit analysis flawed, and the decision to lift structural separation arbitrary and capricious under the Administrative Procedure Act.[25]

B. *BOC Petition*

12. The BOCs collectively request an interim waiver of the *Computer II* rules so that they can continue to provide existing and newcustomers with enhanced services offered pursuant to previously-approved CEI and ONA plans.[26] The BOCs also seek permission to continue unseparated planning and development of enhanced services, including technology tests and market trials, and to offer new enhanced services associated with video dialtone on an integrated basis without obtaining prior Commission authorization. The BOCs request this interim waiver for so long as necessary for the Commission to conduct proceedings to determine whether to extend this relief during the pendency of the remand proceeding.[27] The BOCs interpret *California III* to reinstate the *Computer III* CEI plan requirements. Nonetheless, as a contingency, they request the broadest relief that may ultimately be deemed necessary by the Commission -- a waiver of the *Computer II* rules for their existing enhanced services.[28] The BOCs state that, absent a waiver, they could be found in violation of the *Computer II* rules upon issuance of the Ninth Circuit's mandate.[29] The BOCs contend that it will be impossible for them to comply with the *Computer II* structural separation requirements immediately.

13. The BOCs argue that there is good cause to waive the *Computer II* rules because approximately five million customers depend upon BOC enhanced services for their business and personal use.[30] The BOCs state that a return to structural separation would require relocating enhanced service equipment, hiring new personnel, and locating and renovating facilities. Such an undertaking, according to the BOCs, would severely disrupt customer service.[31] The BOCs assert that CEI requirements, cost accounting safe-

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prior authorization not required by FCC rules; and (3) state network disclosure rules that required initial disclosure at a time different than the FCC rule. *Id.* at 7631, para. 121.

[15] After the implementation of ONA and the removal of structural separation requirements, the BOCs still were required to comply with CEI parameter requirements in the provision of all the unbundled basic ONA services they offered to ESPs, even though the BOCs may not have used the basic services in their own enhanced services, and even though they were no longer obligated to file CEI plans. *See infra* para. 21 for a description of CEI requirements.

[16] California v. FCC, 4 F.3d 1505 (9th Cir. 1993) (*California II*).

[17] *Id.* at 1511-13.

[18] California v. FCC, Nos. 92-70083, 92-70186, 92-70217, 92-70261, slip op. (9th Cir. Oct. 18, 1994) (*California III*).

[19] *Id.* at 12760-61, 12770-75.

[20] *California I*, 905 F.2d at 1232-33.

[21] *California III*, slip op. at 12762.

[22] *Id.* at 12767-68.

[23] *Id.* at 12762-63.

[24] *Id.* at 12761-62, 12767.

[25] *Id.* at 12768.

[26] BOC Petition at 2. The BOCs list existing enhanced services in the BOC Petition at Exhibit A. The BOCs are also offering certain enhanced services pursuant to continuing waivers of *Computer II*. Such offerings are unaffected by the court's recent decision, as the Commission granted permission to offer these services on an integrated basis independent of *Computer III*.

[27] BOC Petition at 2.

[28] *Id.* at 11-12.

[29] *Id.* at 11.

[30] *Id.* at 12-13.

[31] *Id. See also* Letter from Richard McCormick, Chairman and Chief Executive, US West, to Reed Hundt, Chairman, FCC, November 29, 1994. In the letter, US West argues that in addition to the disruption and displacement that would occur if structural separation were required for existing services, there

guards, and other safeguards that the Commission has established will prevent discrimination against competing enhanced service providers and cross-subsidization of BOC enhanced services by regulated service ratepayers.[32]

C. *Pleadings*

14. MCI Telecommunications Corporation (MCI), CompuServe Incorporated (CompuServe), Information Technology Association of America (ITAA), and Prodigy Services Company (Prodigy) oppose, in whole or in part, the BOC Petition. MCI and Compuserve assert that *California III* returns the industry to the structural separation requirements of *Computer II*.[33] MCI states that previous orders in the *Computer II* proceeding establish a specific standard for *Computer II* waivers.[34] MCI claims that the BOC Petition fails to meet these requirements, because the requested relief would "eviscerate the *Computer II* rules"[35] and the BOCs have provided insufficient data to support their claim that service disruption would occur if structural separation were reimposed.[36] According to MCI, the BOCs must also demonstrate that the enhanced services the BOCs are unable to provide on a structurally separate basis are not available from competing ESPs.[37] Finally, MCI contends that *California III* demonstrates that existing safeguards are insufficient to prevent anticompetitive conduct by the BOCs during a *Computer II* waiver.[38]

15. CompuServe, Prodigy, and ITAA state that they do not object to the granting of a waiver limited to those enhanced services which the BOCs were offering on an integrated basis at the time of the *California III* decision.[39] On the other hand, these parties object to the portions of the BOC Petition that request permission to conduct enhanced service research and development and to initiate new enhanced services related to video dialtone.[40] CompuServe, Prodigy, and ITAA assert that the *California III* decision demonstrates that the BOCs do have the ability to discriminate against competing ESPs during the pendency of a waiver.

16. CompuServe suggests that the BOCs should begin planning for a return to structural separation, and that the BOCs' assertions about the difficulty of structural separation derive from their own unwillingness to plan for such a contingency.[41] Prodigy argues that the Commission should put the burden on the BOCs to justify on a service-specific basis continuing waivers for existing enhanced services and seek further comment on refining the separate subsidiary requirements to prevent access discrimination.[42] According to ITAA, the Commission should attempt to maintain the status quo until it has an opportunity to respond to *California III*.[43] ITAA argues that the Commission should grant a waiver only for existing enhanced services until the BOCs can file, and the Commission can decide on, service-specific requests for waivers for each of the enhanced services the BOCs provide on an integrated basis.[44]

17. Two parties support or do not oppose the BOC Petition. United States Telephone Association (USTA) states that the BOCs have provided "compelling evidence" of the potential for widespread confusion and service disruption if a waiver is not granted.[45] According to USTA, "it is only sensible" that the Commission should grant the requested waiver to minimize uncertainty during the pendency of remand proceedings.[46] Newspaper Association of America (NAA) states that it "recognizes that there may be a practical need for a brief, interim waiver."[47] Although it does not oppose a waiver, NAA urges the Commission to use the *California III* remand as an opportunity to reimpose structural separation.[48]

18. In reply, the BOCs state that five of the six parties that filed comments support or do not oppose the major portion of the relief requested in the BOC Petition.[49] The BOCs argue that none of the comments opposing the BOC Petition take into account the fact that the Bureau granted a waiver under substantially similar circumstances in

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would also be significant costs to consumers if US West were unable to introduce new enhanced services in the next six to twelve months. Among the service offerings US West claims could be affected are services to enable teachers to exchange information using voice mail technology and to provide access to the Internet.

[32] BOC Petition at 7-11.

[33] MCI Opposition at 5; Compuserve Opposition at 2.

[34] MCI Opposition at 6-9.

[35] *Id.* at 9.

[36] *Id.* at 9-10. MCI also argues that the BOCs have not met the waiver standard for research and development of future services, as there is not even a risk of service disruption for such services.

[37] *Id.* at 11.

[38] *Id.* at 13-14.

[39] CompuServe Opposition at 3; Prodigy Comments at 1-3; ITAA Opposition at 4. Compuserve and Prodigy also state that they are willing to support a waiver only for as long as it takes for the Commission to conduct a proceeding to determine whether to extend the interim waiver until completion of the remand proceeding required by *California III*. CompuServe Opposition at 3; Prodigy Comments at 1-3.

[40] CompuServe argues that there is no public policy rationale for permitting the BOCs to offer new enhanced services when the lawfulness of the underlying *Computer III* regime is in doubt. Compuserve Opposition at 7.

[41] *Id.* at 7.

[42] Prodigy Comments at 5.

[43] ITAA Opposition at 2.

[44] *Id.*

[45] USTA Comments at 1.

[46] *Id.* at 3. USTA notes that the Commission adopted a similar waiver in 1990 following the *California I* decision, and that the *California III* court did not criticize that decision. *Id.* at 2-3. USTA argues that the Commission's *Computer III* framework is fundamentally sound, and that even if structural separation is ultimately reimposed, the transition should occur after the conclusion of remand proceedings. *Id.* at 3

[47] NAA Comments at 1.

[48] *Id.* at 2. NAA also submitted an *ex parte* letter elaborating on its arguments about the procedural and substantive course the Commission should follow once it initiates remand proceedings. *See* Letter from Richard E. Wiley, attorney for Newspaper Association of America, to Reed Hundt, Chairman, FCC, November 30, 1994. In the letter, NAA urges the Commission to issue a Notice of Proposed Rulemaking on the broad question of whether structural relief for BOC enhanced services is justified. NAA argues that structural separation is particularly appropriate for certain types of enhanced services, such as electronic publishing. *Id.* at 4-5.

[49] BOC Joint Reply at 1.

1990.[50] The BOCs reject the suggestion that the Georgia Public Service Commission's findings regarding BellSouth's "MemoryCall" voice mail service demonstrate the ineffectiveness of nonstructural safeguards. According to the BOCs, the MemoryCall proceeding applied a far stricter standard than the Commission should use to evaluate an interim waiver request; involved a fundamental policy difference between state and federal regulators; and was preempted by the Commission.[51]

III. DISCUSSION

A. *Regulatory Regime After California III*

19. In *California III*, the court remanded only one issue: the adequacy of the *BOC Safeguards Order* 's cost benefit analysis to support the complete removal of structural separation after the unbundling of basic network services described in the BOC ONA plans.[52] The *California III* court did not hold that the safeguards elaborated in the *BOC Safeguards Order* were inadequate; rather, it stated that the Commission had never explained its rationale for lifting structural separation requirements completely, after the "dilution" of the original vision for ONA.

20. The court did not find fault with the *Computer III* CEI service-specific plan regime. In fact, the court acknowledged that the CEI plans ensured that competitors received substantially equivalent interconnection.[53] Thus, we disagree with parties who argue that the effect of *California III* is to reinstate *Computer II* rules that had previously governed the BOCs' enhanced services offerings. Instead, we conclude that the partial vacation of the *BOC Safeguards Order* generally reinstates the *Computer III* service-by-service CEI plan regime, augmented by the implementation of ONA under BOC ONA plans. Thus, as safeguards against access discrimination, BOCs must file CEI plans for integrated enhanced services until the Commission concludes remand proceedings.

21. CEI plans were designed to ensure that the "basic service functions utilized by a carrier-provided enhanced service [were] available to others on an unbundled basis, with technical specifications, functional capabilities, and other quality and operational characteristics, such as installation and maintenance times, equal to those provided to the carrier's enhanced services."[54] BOC CEI plans detailed how BOCs proposed to comply with a set of "CEI parameters" for specific enhanced services. CEI parameters established in *Computer III* include: interface functionality, unbundling of basic services, resale, technical characteristics, installation and maintenance reporting, end user access, CEI availability, minimization of transport costs, and recipients of CEI.[55] Under the CEI requirements, the BOCs must provide ESPs with interconnection to the BOCs' networks at the same tariffed rates that the BOCs themselves pay.[56] BOCs must provide ESPs with access to all network service elements that the BOCs require for the provision of their own enhanced services.[57] CEI therefore prevents the BOCs from providing competing ESPs with network connections inferior to those the BOCs themselves rely on.[58]

22. In the interim, until the Commission acts on the *California III* remand, the BOCs must continue to comply with the procedures established in their approved ONA plans, since ONA requirements are independent of the removal of structural separation requirements.[59] For example, BOCs still must provide new ONA services that ESPs need to provide enhanced services.[60] The 120-day service request process permits ESPs to request a new ONA basic service and within 120 days to receive a response from the BOC of whether the BOC will provide the service.[61] The BOC must give specific reasons if it declines to offer the service. The BOC evaluation is to be based on the ONA

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[50] *Id.* at 2-5. The BOCs claim that the only differences between the 1990 waiver and their current waiver request are that the BOC Petition requests authorization to conduct integrated research, development, and market trials, and that the BOC Petition seeks a waiver for new enhanced services associated with video dialtone service offerings. According to the BOCs, the rationale for the Commission's refusal to grant a waiver for research and development in 1990 -- the possibility of improper cross subsidization -- no longer applies, as *California III* held that the Commission's cost accounting safeguards would protect against such conduct. As for video dialtone, the BOCs argue that the *Video Dialtone Reconsideration Order*, which was released after *California III* was decided, indicates that the Commission has determined that integrated video dialtone enhanced services would be in the public interest. *See* Telephone Company-Cable Television Cross Ownership Rules, *Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, FCC 94-269, para. 232 (released November 7, 1994).

[51] BOC Joint Reply at 6-8.

[52] The court concluded that the Commission "has addressed the concerns expressed by this court in *California I*." *California III*, slip op. at 12761. The *California III* court also upheld challenges to the Commission's resolution of CPNI and preemption issues in the *BOC Safeguards Order*. As noted above, the only Commission action that the court found to be inadequate was the Commission's failure to explain, in the *BOC Safeguards Order*, how access discrimination safeguards were sufficient under the approved ONA plans, rather than under the model of ONA the court determined to be required by *Computer III*. *See supra* para. 11.

[53] *California III*, slip op. at 12762.

[54] *Phase I Order*, 104 FCC Rcd at 1036, para. 147.

[55] In their CEI plans, BOCs explain how they comply with these CEI parameters by indicating, for example, for the "interface functionality" parameter, that all basic network services listed in its plan will use standard published interfaces available to other ESPs and comply with network interface disclosure requirements. For the "unbundling of basic services" parameter, BOCs must show that all basic services and functions used to provide enhanced services have been unbundled, and are available under tariff to other ESPs. *See Phase I Order*, 104 FCC 2d at 154-93.

[56] *Id.* at 1065-66, paras. 147, 214.

[57] *Id.* at 1064, paras. 214-15.

[58] *Id* . at 1034-58, paras. 142-200.

[59] *See* Computer III Remand Proceedings, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*).

[60] We observe that BOCs report that more than 150 unbundled basic services are offered by one or more BOCs. ESPs can select the services they need to provide specific enhanced services. During the BOC ONA plan development process, ESPs identified many of these services as needed.

[61] *BOC ONA Order*, 4 FCC Rcd at 205-06, para. 397; *BOC ONA Amendment Order*, 5 FCC Rcd at 3117, para. 124; BOC ONA Further Amendment Order, 6 FCC Rcd at 7654-56, paras. 14-19.

selection criteria set forth in the original *Computer III Phase I Order:* market area demand, utility as perceived by ESPs, and costing and technical feasibility. If an ESP finds the BOC response unsatisfactory, it may seek redress from the Commission by filing a petition for declaratory ruling.[62] ESPs may also request that the Information Industry Liaison Committee (IILC) of the Alliance for Telecommunications Industry Solutions consider the technical feasibility of the service before requesting the service from one or more BOCs.

23. In addition, the BOCs must continue to comply with other safeguards against access discrimination, including CEI parameters and the equal access standard requirements discussed above, CPNI rules, nondiscrimination reporting requirements, and network information disclosure rules.[63] Our experience with these safeguards indicates that they are effective in reducing the ability of BOCs to engage in access discrimination.[64]

24. Finally, as they could under the *Computer III* CEI regime, the BOCs may continue to perform on an integrated basis, planning, research, and development for new enhanced services, including technical and market trials.[65]

B. ***Waiver and CEI Plan Filing Requirements***

25. In response to a petition, the Commission may waive any provision of its rules or orders if good cause is shown.[66] Courts have upheld an agency's authority to adopt interim measures to prevent industry disruption after agency rules have been vacated. These interim measures may remain in effect while the agency conducts remand proceedings.[67] We find that it is in the public interest to grant a limited interim waiver of the Commission's *Computer III* rules to permit the BOCs to continue offering on an integrated basis enhanced services that are not the subject of approved CEI plans, pending the filing and review of CEI plans. Although the ultimate question raised by the *California III* decision remains to be addressed, we are confident that the continued application of our nonstructural safeguards will enable us to protect against anticompetitive behavior by the BOCs during the duration of the waiver.

26. We conclude that, taking into account the safeguards against access discrimination discussed in the previous section, the public interest will be served by granting the waivers in this order and by our clarifying how BOCs may provide integrated enhanced services while the Commission completes the remand proceedings. The BOCs have been offering some enhanced services on an integrated basis pursuant to approved CEI plans for more than six years and other enhanced services pursuant to approved BOC ONA plans in the several years since structural relief has been granted. We find that it would not be feasible for the BOCs to offer enhanced services on a fully separated basis immediately. More than five million customers now subscribe to and depend upon BOC enhanced service offerings, and customers who are not yet receiving service may have made business plans based on a legitimate expectation that they would be able to receive services for which CEI plans have been approved. Absent a waiver, the BOCs could be forced to suspend certain enhanced services upon which millions of customers depend, thus causing severe dislocation and confusion.[68] This would be a8Dparticularly disruptive outcome if the Commission were to decide on remand to permit the BOCs to offer enhanced services on an integrated basis. When coupled with existing nonstructural safeguards, an interim waiver would prevent such hardship, ensure continued availability of new services to the public, lessen disruption to and uncertainty for BOC business planning, and preserve the efficiencies achieved through BOCs integrating enhanced services.

27. While temporarily suspending the provision of some BOC enhanced service offerings could significantly harm customers, the potential harm to competitors and ratepayers of permitting the BOCs to continue certain integrated operations for a limited time is quite small. The Bureau issued a similar type of waiver in 1990 following *California I*, and that waiver was not subsequently challenged before the Commission or in court.[69] The arguments in favor of granting a waiver are even stronger now than they were four years ago, because now the Commission has put further safeguards into place through implementation of ONA, and the number of customers facing service dis-

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[62] *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7677-78, Appendix B.

[63] *BOC Safeguards Order*, 6 FCC Rcd at 7597-7614, paras. 57-89.

[64] We do not decide in this order whether such requirements provide sufficient protection to justify full structural relief as contemplated by the *BOC Safeguards Order*. That issue is for the Commission to decide in its remand proceedings.

[65] BOC market trials are subject to the requirements of the *BOC Market Trial Order*. *See supra* note 9.

[66] 47 C.F.R. § 1.3. A showing of good cause requires the petitioner to demonstrate special circumstances that warrant deviation from the rule and to show how such deviation would serve the public interest. *See* Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[67] *See* Mid-Tex Electric Cooperative Inc., v. Federal Energy Regulatory Commission, 822 F.2d 1123 (D.C. Cir. 1987) (upholding agency adoption of interim measures, and holding that such measures may remain in effect while the agency conducts court-ordered remand proceedings); American Gas Association v. Federal Energy Regulatory Commission, 888 F.2d 136 (D.C. Cir. 1989) (stating that an agency has authority to promulgate interim measures, but holding the specific measure before the court invalid on the grounds that it did not sufficiently address the court's concerns and that two years had passed without the agency issuing a final order).

[68] We reject MCI's suggestion that there is some special burden for *Computer II* waivers, or that the BOCs must demonstrate that customers would be unable to obtain similar enhanced services from competing ESPs. *See* MCI Opposition at 9-13. This order sets forth a limited, interim waiver, under circumstances highly analogous to those present when the Commission granted a similar waiver in 1990. Even if some BOC enhanced services may be available from other ESPs, the potential for dislocation of existing customers and industry confusion is sufficient to justify a waiver. In contrast to the situation during previous *Computer II* waiver requests, the BOCs are now subject to both CEI and ONA requirements, as well as other safeguards to protect against anticompetitive conduct during the duration of the waiver. Moreover, the Commission has concluded that BOC provision of integrated enhanced services has significant public interest benefits, and that determination has been affirmed by the Ninth Circuit. *See California I*, 905 F.2d at 1231-32.

[69] The Court in *California III* noted that we had granted a waiver following *California I* and did not suggest that the waiver was unwarranted or inappropriate. *See California III*, slip op. at 12757.

ruptions has increased more than thirty-fold since 1990. Moreover, the scope of the Ninth Circuit's remand before us is much narrower than the court's remand in 1990.

28. For all of these reasons, we conclude that *Computer III* waivers serve the public interest by enabling the BOCs to continue providing integrated enhanced services pursuant to the CEI plan requirements that we establish below. In order to avoid unnecessary disruption and customer dislocation, and to allow the Commission sufficient time to assess more fully the effects of the Ninth Circuit's opinion and formulate a response, we grant the BOCs, pending conclusion of further proceedings on remand, a limited waiver of *Computer III* to continue providing enhanced services and conducting market trials initiated after the CEI plan approval requirement had expired. We condition this waiver on their filing CEI plans and market trial notifications for these services within sixty days after the release of this order.

29. As noted above, we conclude that *California III* returns the regulation of BOC enhanced services to a *Computer III* servicespecific CEI plan regime. Thus, a *Computer II* waiver is not required, and we need only grant the BOCs limited *Computer III* waivers to encompass enhanced services that do not comply with the CEI plan requirements.[70] To the extent that the effect of *California III* might be regarded as returning regulation of BOC enhanced services to the *Computer II* framework, however, we believe that a limited waiver of *Computer II* would be in the public interest for the same reasons stated above.

30. Accordingly, we grant any necessary waivers, pending the completion of remand proceedings, so that BOCs are subject to the following requirements:

a. BOCs may continue to provide existing enhanced services pursuant to approved CEI plans. If new basic services are used to provide those enhanced services or major changes are made in the enhanced services as approved in specific CEI plans, the BOCs must file amendments to the CEI plans within sixty days. Whether the Commission will seek public comment on those amendments will depend on the magnitude of the change.[71] BOCs may continue to provide these services while the Commission reviews any amendments.

b. BOCs may continue to provide existing enhanced services on an integrated basis pursuant to approved ONA plans.[72] Each BOC is required to file CEI plans for enhanced services not covered by existing CEI plans within sixty days of the release date of this order. These CEI plans will be placed on comment cycles and will be deemed approved in ninety days unless the Commission notifies the BOC otherwise. Because the BOC ONA plans already incorporate the CEI parameters that will be reviewed in the CEI plans filed for these services, and to avoid customer disruption, BOCs may continue to provide these services pursuant to this waiver while the Commission reviews the CEI plans.

c. BOCs must file CEI plans for new enhanced services that they propose.[73] New enhanced services shall not be provided until their CEI plans are approved by the Common Carrier Bureau.

d. BOCs may continue existing market trials of enhanced services. Within sixty days of the release of this order, for market trials currently underway, BOCs must file market trial notifications as required in the *BOC Market Trial Order*.[74] As indicated in that order, market trials will be deemed approved in ninety days unless the Commission notifies the BOC otherwise. BOCs must follow the market trial requirements of the *BOC Market Trial Order* for new market trials they propose.

e. As they could under the *Computer III* CEI plan regime prior to the lifting of structural separation, the BOCs may continue to perform on an integrated basis planning, research, and development for new enhanced services, including technical trials. We note that although the Commission's 1990 *Computer II* waiver denied the BOCs this ability, the *California III* court has concluded that the Commission's strengthened cost accounting safeguards are adequate safeguards against improper cross-subsidization. The possibility of access discrimination in integrated research and development activities is minimal, as the BOCs cannot discriminate in providing access to services that do not yet exist. As the BOCs explain in their petition, the failure to grant such a waiver will lead to significant wasted expenditures in identifying noncompliant research and development activities, and could delay or halt the deployment of new enhanced services of benefit to consumers.[75]

31. The BOC Petition also seeks a waiver to offer enhanced services associated with video dialtone. We do not grant this part of the requested waiver, because we conclude that this new enhanced service is subject to CEI plan requirements. We see no reason to treat enhanced services associated with video dialtone service differently from other services subject to CEI filing requirements.

IV. CONCLUSION

32. In view of the potential for severe customer dislocation and the effective regulatory safeguards the Commission now has in place, we conclude that the limited interim waiver that we adopt in this order is in the public interest. We therefore grant the BOC Petition in substantial part.

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[70] *Computer III* waivers are required only for enhanced services provided subject to approved CEI plans requiring amendments, new enhanced services currently provided without approved CEI plans, and existing market trials provided without market trial notifications.

[71] In the past, minor amendments to CEI plans were generally deemed approved after 14 days of filing with the Bureau unless problems were identified by the staff. More significant amendments were placed on public notice and allowed to become effective after 90 days if no problems were identified.

[72] As a result of *California III*, BOCs are, however, no longer subject to the ONA Amendment filing requirement when a BOC proposes to provide a new basic service it plans to use with its own enhanced services. This access discrimination safeguard applies after structural separation requirements are removed.

[73] For the purposes of this order, "new enhanced services" include any enhanced services which are not being offered to customers as of the effective date of this order.

[74] *BOC Market Trial Order*, 4 FCC Rcd at 1271-72, paras. 46-47.

[75] BOC Petition at 15-16.

VI. Ordering Clauses

33. Accordingly, IT IS ORDERED that pursuant to Sections 0.91, 0.291, and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, the BOC Joint Contingency Petition for Interim Waiver of the *Computer II* Rules, IS GRANTED to the extent described herein and otherwise DENIED.

34. IT IS FURTHER ORDERED that this order IS EFFECTIVE upon issuance of the Ninth Circuit's mandate in *California III*.[76]

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

[76] We find good cause that the effective date of this order should be less than 30 days from publication in the Federal Register. *See* Section 553(d)(3) of the Administrative Procedure Act, 5 U.S.C. § 553(d)(3). As discussed above, five million customers could face service disruptions if the Ninth Circuit issues its mandate and a waiver is not in place. We believe that substantial confusion for both customers and the telecommunications industry will be avoided if we ensure that this order goes into effect upon issuance of the *California III* mandate.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI TKR OF HOUSTON, INC.

Petition for Reconsideration
of Cable Services Bureau Order
Denying Petition for Reconsideration
of the City of Houston's Certification
to Regulate Basic Cable Service Rates
(TX0755, TX0736)[1]

ORDER ON RECONSIDERATION

Adopted: January 12, 1995; Released: January 12, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 21, 1994, TCI TKR of Houston, Inc. d/b/a TCI Cablevision of Houston ("TCI") filed a pleading challenging a *Memorandum Opinion and Order*[2] (*"Order"*) adopted by the Cable Services Bureau ("the Bureau") pursuant to delegated authority.[3] The *Order* denied TCI's petition for reconsideration challenging the certification of the City of Houston ("the City") to regulate TCI's rates for basic cable service and associated equipment.[4] In its challenge, TCI requests that the Bureau's decision in the *Order* be set aside and that TCI's petition for reconsideration be granted, rescinding the City of Houston's certification to regulate rates.[5]

2. A petition for reconsideration of a Commission action or an action taken pursuant to delegated authority must be filed within 30 days from the public notice of that action.[6] To warrant consideration, it must state the specific form(s) of relief sought by the petitioner and allege with particularity the respects in which the contested action should be changed.[7] It should also cite findings of fact or conclusions that the petitioner believes to be in error and indicate how the petitioner believes they should be changed.[8]

II. BACKGROUND

3. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[9] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[10] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[11] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[12] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[13]

4. In its original petition for reconsideration, TCI argued that its Houston system is subject to effective competition in its franchise area. TCI based its claim of effective competition on the allegation that its system's subscriber penetration rate was less than 30% in its franchise area.[14] To support its claim, TCI submitted evidence indicating that its system serves 51,161 subscribers in a franchise area

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[1] TCI also included Community Unit Identification ("CUID") numbers TX0737 and TX0748 in it pleadings. However, TCI has also explained that while the areas represented by these CUID numbers are served by TCI's Houston headend, they do not represent areas that are part of TCI's Houston franchise area. Therefore, we have excluded them from the terms of this order.

[2] *TCI TKR of Houston, Inc.*, DA 94-1395 (released Dec. 5, 1994).

[3] TCI's pleading is styled as an application for review. However, as TCI's challenge refers to evidence which the Bureau did not consider in its initial decision and as the Bureau has delegated authority to review challenges to a franchising authority's certification to regulate basic rates (*see* 47 C.F.R. § 0.321), we will consider TCI's pleadings as a petition for reconsideration.

[4] The City of Houston filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 25, 1993. The certification became effective on November 24, 1993.

[5] TCI also filed a request for emergency stay on December 21, 1994. Because we are deciding TCI's petition for reconsideration on its merits, TCI's stay request has been rendered moot.

[6] 47 C.F.R. § 1.106(f).

[7] 47 C.F.R. § 1.106(d)(1).

[8] 47 C.F.R. § 1.106(d)(2).

[9] Communications Act of 1934 § 623(a)(4); 47 U.S.C. §543(a)(4).

[10] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[11] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[12] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[13] 47 C.F.R. § 76.911(c).

[14] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2); 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 per cent of the house-

consisting of 200,352 "homes."[15] By using these figures, the ratio of total TCI subscribers in relation to the total number of homes in the franchise area yields a subscriber penetration rate of 25.5%. Because this number is less than 30%, TCI argued that its system should be exempt from rate regulation and that the City's certification to regulate TCI's basic rates and associated equipment should be rescinded.

5. In its *Order*, the Bureau denied TCI's petition for reconsideration because TCI, in deriving its subscriber penetration rate, inappropriately relied upon "housing unit" data, rather than "occupied housing unit" data, to determine the total number of households in its franchise area.[16] The term "housing units" reflects both occupied and vacant housing units. Because our rules require the use of household data reflecting the number of occupied housing units, the Bureau rejected TCI's claim of effective competition.[17] As a result, the automatic stay imposed on the City's certification to regulate rates was terminated and TCI was ordered to file the applicable rate justifications with the City.

6. TCI now argues that the Bureau erred in denying its original petition because it did not consider an alternative argument made by TCI in its original petition that relied upon occupied housing unit data. TCI claims that, while the central argument in its original petition relied upon total housing units data, it had also made an alternative argument relying upon the total number of occupied housing units in its franchise area. Specifically, TCI noted in its original petition that the City, when submitting its request for certification to the Commission, attached a chart listing the number of subscribers served and the number of households located within the franchise areas of each cable operator subject to its jurisdiction. This chart indicated that there are 179,655 households or occupied housing units in TCI's franchise area.[18] TCI claimed in a footnote to its original petition that when this figure, representing occupied housing unit data, is used to measure TCI's subscriber penetration in its franchise area, the rate still remains below 30%. Specifically, dividing 179,655 total households by TCI's total subscriber figure of 51,572 [19] yields a subscriber penetration rate of 28.7%. In its original petition, TCI stated, in reference to the City's household figure, that, although it disagrees with the use of occupied housing unit data rather than housing unit data, its system would still qualify for an exemption from rate regulation because it is subject to effective competition even when using the occupied housing unit data provided by the City with its request for certification. TCI asserts that the Bureau disregarded this alternative argument in issuing its *Order*.

7. TCI notes that the Bureau has recently issued several orders,[20] involving certification challenges, which have granted various operators' petitions for reconsideration despite the fact that the operators' claims alleging the presence of effective competition were initially based on housing unit data rather than on occupied housing unit data.[21] TCI asserts that the Bureau's decision in this case failed to comport with the standard established in this line of cases and, therefore, must be set aside.

III. DISCUSSION

8. To satisfy the low penetration test for effective competition, an operator must compare two statistics: 1) the operator's total number of subscribers in its franchise area, and 2) the total number of households in the franchise area.[22] To prove that their systems are subject to effective competition, our rules require that operators must use data reflecting occupied housing units in establishing the total number of households in their franchise areas.[23] Although TCI's central argument in its original petition did not rely upon the use of occupied housing unit data, TCI also presented an alternative argument that did rely upon the

holds in the system's franchise area subscribe to the system's service. Communications Act of 1934 § 623(l)(1)(A); 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[15] In determining the total number of households in the franchise area, TCI counted both vacant and occupied housing units. TCI argued that this should be the appropriate measure for determining the total number of households in the franchise area because it includes both occupied homes and those housing units that are presently vacant but intended for occupancy. TCI claimed that this figure is more stable and reliable than occupied housing unit data because it does not fluctuate as residents move into and out of the City.

[16] The Bureau also determined that TCI had inappropriately excluded 411 subscribers from its total number of subscribers in deriving its subscriber penetration rate. TCI claimed that these accounts were excluded from its total subscriber count because they consisted of TCI employees who received free cable service at their homes. The Bureau determined that although cable service was provided to TCI employees in exchange for services, rather than fees, this did not materially change the nature of the service to justify the exclusion of these subscribers from its total number of subscribers. Therefore, the Bureau accounted for this increase by adding 411 subscribers to the total number of subscribers claimed by TCI in its petition, resulting in a revised figure of 51,572.

[17] *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*) . As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra*. The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term "households" reflects only occupied housing units.

[18] This document indicates that the City used household data that incorporated only occupied housing units, as defined by the Census Bureau.

[19] TCI has not challenged the Bureau's use of this revised subscriber figure. Therefore, we will use the subscriber figure that the Bureau previously determined to be the correct figure.

[20] *See, e.g., Cable TV of Georgia Limited Partnership*, DA 94-1523 (released Dec. 19, 1994), *Insight Communications Company of New York, Inc.*, DA 94-1524 (released Dec. 19, 1994), *LaSalle Telecommunications, Inc.*, DA 94-1527 (released Dec. 19, 1994), *TCI Cablevision of Georgia*, DA 94-1437 (released Dec. 12, 1994).

[21] The Bureau granted these petitions for reconsideration because, although the operators did not initially rely upon occupied housing unit data, occupied housing unit data was contained in the supporting or supplemental materials supplied by the operators with their petitions.

[22] *See* Communications Act of 1934 § 623(l)(1)(A); 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[23] *See Third Recon. Order, supra*.

use of occupied housing unit data. As the record indicates, we agree with TCI that our initial review failed to consider TCI's use of the appropriate data in its petition in order to satisfy the low penetration test for effective competition. Accordingly, we will reconsider our decision.

9. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition. [24] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[25] TCI has met this burden. Although initially TCI based its effective competition claim on "housing unit" data, TCI provided alternative data in its petition that reflects the use of "occupied housing unit" data. According to this data, there are 179,655 occupied housing units in its franchise area. A comparison of the number of TCI subscribers in relation to the total number of households in TCI's franchise area yields a subscriber penetration level of 28.7%.[26] Thus, we find that TCI's system serving the City of Houston is subject to effective competition. Accordingly, we grant TCI's petition. [27]

10. We wish to make clear that even though we are granting TCI's petition, we do not accept TCI's argument that housing unit data should be used instead of occupied housing unit data in establishing the total number of households in an operator's franchise area for purposes of determining the presence of effective competition. Our rules clearly require the use of occupied housing unit data.[28]

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that TCI's application for review when treated as a petition for reconsideration IS GRANTED.

12. IT IS FURTHER ORDERED that the certification of Houston to regulate TCI's basic cable rates IS RESCINDED.

13. This action is taken under delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[24] 47 C.F.R. § 76.906.
[25] 47 C.F.R. § 76.911(b)(1).
[26] This rate is derived when using 51,572 as the appropriate total number of TCI subscribers.
[27] Upon grant of a petition for reconsideration, the designated authority may "[s]imultaneously reverse or modify the order from which reconsideration is sought." 47 C.F.R. § 1.106(k)(1)(i).
[28] *See Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS OF MICHIGAN, INC.

Petition for Reconsideration

of the Certification of
Plainfield Charter Township, MI
to Regulate Basic Cable Service Rates
(MI0677)

MEMORANDUM OPINION AND ORDER

Adopted: January 12, 1995; Released: January 12, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 29, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely petition for reconsideration challenging the certification of Plainfield Charter Township, Michigan (the "Township") to regulate rates for basic cable service and associated equipment.[1] The Township filed an objection to C-TEC's petition, to which C-TEC filed a reply. On August 19, 1994 C-TEC supplemented its filings pursuant to a recent Commission Order.[2] On November 30, 1994, C-TEC filed a response to a Bureau request for an explanation of the subscriber data included in C-TEC's petitions and supplements.[3] On January 3, 1995, C-TEC filed a response to a Bureau request for further explanation of the subscriber data included in C-TEC's petitions and supplements.[4]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[5] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[6] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[7] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[8] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[9]

II. DISCUSSION

3. C-TEC argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Plainfield Charter Township, Michigan, its alleged franchise area.[10] The supplement to C-TEC's petition shows that the cable system currently serves 310 subscribers in an area with 3,432 households (that is, occupied housing units),[11] or 9.0 percent of the total number of households. As supporting documentation, C-TEC provides 1990 Census data[12] which shows that there are 3,432 occupied housing units in its alleged franchise area.[13] C-TEC also submits a computer print-out with sufficient

[1] The Township filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on September 30, 1993. The certification became effective on October 30, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Letter to Jacqueline Cleary, Counsel to C-TEC Cable Systems of Michigan, Inc. (November 25, 1994).

[4] Letter to Jacqueline Cleary, Counsel to C-TEC Cable Systems of Michigan, Inc. (December 22, 1994).

[5] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[7] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[8] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[9] 47 C.F.R. § 76.911(c).

[10] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(a); 47 C.F.R. § 76.905(b)(1).

[11] Both the Cable Act and the Commission's rules require that effective competition be demonstrated based on the number of "households" in the franchise area. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905 (b). As the Commission stated recently, "we presume that Congress did not intend $households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Reconsideration Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8..

[12] As the Bureau has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra.*

[13] The census data provided indicates that there are a total of 8,884 occupied housing units in the Township. It also indicates that there are two subdivisions located partially within the Township, Comstock Park and Northview, which respectively account for 484 and 4,968 occupied housing units within the Township. C-TEC provides a chart which relies on 1990 census

subscriber information to show that it has 310 subscribers to its basic cable service. In its January 3, 1995 response, C-TEC explains that it does not individually count, in its 310 subscriber figure, approximately 500 mobile homes served by C-TEC as part of a bulk account.

4. The Township asserts that C-TEC's effective competition claim is inappropriately based on areas unserved by C-TEC's cable system. First, the Township argues that pursuant to a new franchise agreement which became effective on January 1, 1994, C-TEC's franchise area is limited to the area actually served by C-TEC. The Township argues that, as C-TEC's service area is limited to certain areas of the Township, it is these areas, and not the entire Township which must form the basis of any effective competition claim. In the alternative, the Township argues that C-TEC has made an affirmative decision to redefine its franchise area.[14] Specifically, it alleges that C-TEC will not penetrate the service area of TCI, a competing cable operator in its franchise area. As supporting documentation, the Township provides a map of the Township with marks highlighting the areas served by C-TEC. According to the Township, C-TEC's actual service area consists of 1,075 households, of which C-TEC serves 824.[15] The Township argues that under this redefined franchise area, C-TEC actually has a 76.6 percent penetration level, and therefore has failed to overcome the presumption of the absence of effective competition.

5. In response, C-TEC disagrees with the Township's interpretation of the new franchise agreement. C-TEC emphasizes that under its previous franchise agreement, effective until January 1, 1994, it was required to expand into unserved areas of the municipality whenever the population density reached a level of five households per 660 feet (or 40 homes per cable mile). It states that as of January 1, 1994, it is required to expand into unserved areas of the municipality whenever the population density reaches at least 30 homes per cable mile. This requisite population density threshold decreases to 25 homes per cable mile in 1998 and 20 homes per cable mile in the year 2000. C-TEC further states that it has requested notification from the franchise authority in the event that the required population density level is reached. As supporting documentation, C-TEC submits a newsletter sent to the Township containing a form for requests to extend cable service, and language indicating C-TEC's intent to expand when economically feasible. This information is supported by the declaration of a responsible official at C-TEC.[16]

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[17] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area. [18] C-TEC has not met this burden. C-TEC fails to base its effective competition claim on its franchise area as defined by its new franchise agreement. We are persuaded that the appropriate franchise area for purposes of effective competition is the area that C-TEC currently serves in Plainfield Charter Township. The relevant section of the new franchise agreement states that:

> *Authorized Area* shall mean the entire area from time tox time within the corporate limits of the municipality, excluding, however, (a) all areas that are within such limits solely due to agreements executed under the authority of Michigan Act 425 of 1984, and (b) all areas not served by Company on the Effective Date [January 1, 1994] unless Company notifies Municipality in writing of its intent to serve such areas and does so within 6 months of such notice.[19]

As we noted previously, the Commission defines a "franchise area" as "the area a system operator is granted authority to serve in its franchise." [20] This new agreement establishes C-TEC's franchise area as its current service area. C-TEC claims that its franchise area remains the entire township as this agreement allows and even requires it to expand into other parts of the township. We disagree. The language of the agreement states that C-TEC's "authorized area" excludes those areas that C-TEC did not serve as of January 1, 1994. Thus, unless C-TEC can demonstrate that it in fact serves all of the Township as of January 1, 1994, or that it has notified the Township of an intent to expand, we must find that C-TEC's franchise area is the area it currently serves.[21] As C-TEC has failed to submit information demonstrating that it is subject to effective competition based on its franchise area as specified in its franchise agreement, its petition is denied. Should C-TEC wish to submit information specific to its actual franchise area, it may do so by filing a petition for revocation pursuant to Section 76.914 of the Commission's rules. 47 C.F.R. § 76.914.

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data to attribute total occupied housing units not in these two subdivisions which are in the Township. This data attributes 3,432 occupied housing units to the Township (not including the two subdivisions) by apparently subtracting the total number of occupied housing units listed in the 1990 census for the two subdivisions.

[14] In its *First Order on Reconsideration*, the Commission clarified its definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164, 1880 (1994) (*"First Reconsideration Order")* . Generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[15] The Township bases this household and subscriber data on what it refers to as "reliable information." *See* Township Objection to Petition for Reconsideration at 2. Supporting documentation is not provided.

[16] *See* Declaration of Robin R. Troop, Vice President and General Manager of C-TEC Cable Systems of Michigan, Inc. (December 17, 1993).

[17] 47 C.F.R. § 76.906.C

[18] 47 C.F.R. § 76.911(b)(1).

[19] Charter Township of Plainfield Nonexclusive 1994 Cable Television Franchise With C-TEC Cable Systems of Michigan, Inc.

[20] *First Reconsideration Order*, at 1180.

[21] In light of our discussion regarding C-TEC's franchise agreement, we need not address the township's argument that C-TEC has redefined its franchise area.

7. Next, we are concerned that C-TEC did not calculate its subscribership in a manner that is consistent with our rules. Specifically, C-TEC apparently counted 500 households, receiving cable service as part of a bulk account, as one subscriber. In the first *Rate Order*, the Commission stated that the number of households will primarily be determined by the number of separately billed or billable customers when testing for the presence of effective competition. *See e.g., Rate Order*, at 5662. However, with respect to multiple dwelling units, the Commission stated, "[w]e except, however, multiple dwelling units that are billed as a single customer." It further stated "[t]herefore, for purposes of the statutory tests for effective competition, individual residences of multiple dwelling units will be treated as separate households subscribing to or being offered video programming services." *Id.* We believe that CTEC's mobile home bulk account should be treated in a manner consistent with the Commission's rules regarding multiple dwelling units. Thus, pursuant to our rules, as each unit within a multiple dwelling unit is counted as a separate household, if occupied, it follows that each unit, if occupied, that is receiving cable service should be treated as a separate household receiving cable service. Likewise, with respect to the mobile home park served by C-TEC, each mobile home, if occupied, would constitute a household under our rules. No reason has been offered in the case which could persuasively demonstrate why each mobile home receiving cable service should not be treated as a separate household receiving cable service.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the petition for reconsideration filed by C-TEC Cable Systems of Michigan, Inc., challenging the certification of Plainfield Charter Township, Michigan to regulate basic cable rates IS DENIED.

9. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 0 C.F.R. § 76.911(c) IS TERMINATED.

10. IT IS FURTHER ORDERED that C-TEC Cable Systems of Michigan, Inc. SHALL FILE the required rate justifications on the appropriate forms with Plainfield Charter Township, Michigan within thirty days of the release date of this *Memorandum Opinion and Order* or within thirty days of receipt of notice from the franchising authority that it is regulating C-TEC Cable Systems of Michigan, Inc.'s rates, whichever is later.

11. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESAT CABLEVISION, INC.

Petition for Reconsideration

of Certification of
Hillsborough County, Florida
to Regulate Basic Cable Service Rates
(FL0996)

MEMORANDUM OPINION AND ORDER

Adopted: January 13, 1995; Released: January 17, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 30, 1993, Telesat Cablevision, Inc. ("Telesat") filed a timely petition for reconsideration challenging the certification of Hillsborough County, Florida ("the County") to regulate rates for basic cable service and associated equipment. [1] The County filed its opposition to Telesat's petition for reconsideration, and Telesat then filed a reply. On August 19, 1994, Telesat submitted a supplement to its petition pursuant to a recent Commission Order. [2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

3. Telesat argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in the unincorporated areas of Hillsborough County, its franchise area. [8] The supplement to Telesat's petition shows0 that the cable system currently serves 3,535 of the 195,271 households (that is, occupied housing units)[9] in the franchise area, or 1.8 percent of the total number of households. As supporting documentation, Telesat provides 1990 Census data[10] which indicates that there are 195,271 households in the franchise area.[11] Telesat also submits a computer print-out with sufficient subscriber information to support its claim that it serves 3,535 subscribers in the franchise area. Finally, Telesat provides an affidavit under penalty of perjury by a responsible official certifying the accuracy of the data included in the petition and supplement.

4. The County claims that Telesat's effective competition claim is inappropriately based on areas unserved by Telesat's cable system. First, the County argues that Telesat

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[1] The County filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" on October 29, 1993, which became effective on November 28, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (" *Effective Competition Order* ").

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: 1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; 2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; 3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or 4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910 (b); *see also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2) and the Commission rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable operator will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the cable system. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[9] As the Commission stated recently, "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994)(*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[10] As the Bureau has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order*, *supra*.

[11] The census data provided indicates that there are 324,872 households in Hillsborough County, and several subdivisions. In a separate sheet provided by Telesat, the household data for Tampa City (Palm River-East Tampa division), Plant City, Tampa City (Tampa division), Temple Terrace City, and Tampa City (Thonotosassa division) is subtracted from the total number of households in the county to account for only the unincorporated areas of the Hillsborough County.

has made an affirmative decision to redefine its service area.[12] (Specifically, it states that Telesat was granted a county-wide franchise on June 1, 1988, but that Telesat has not attempted to expand beyond three specific geographic areas identified in the franchise agreement as Telesat's Primary Service Areas. The County further argues that the Quarterly Activity Reports submitted by Telesat for January through September of 1993 indicate that Telesat's penetration rate as of September, 1993 was actually 42 percent. As supporting documentation, the County provides a map of the Primary Service Areas A, B, and C, quarterly activity reports submitted by Telesat to the County for the reporting periods of January through March, and July through September, and an affidavit by a responsible official certifying the accuracy of the data included in the response.

5. In reply, Telesat states that its effective competition claim is properly based on the entire franchise area. It argues that it has not made an affirmative decision to redefine its franchise area. Telesat states that the Primary Service Areas were created by the County, and that Telesat was required by agreement to meet build-out requirements in these areas before serving other areas in the County. Telesat also contends that the County's own evidence contradicts its assertion that the restricted area exception is appropriate in this case. For example, Telesat points to the Hillsborough County "Cable Television Administration Quarterly Activity Report" which lists the total number of dwellings in Telesat's franchise area as 219,421 and the total number of subscribers as 3,565, which amounts to a penetration level of 1.6 percent.[13] Telesat further argues that the County's Quarterly Activity Report does not indicate that Telesat has restricted its franchise area to the Primary Service Areas. Rather, the County uses the total number of homes in the unincorporated areas of the County to describe Telesat's franchise area. Finally, Telesat maintains that "the limits of its actual service area are shaped by competitive forces, because the County has granted franchises to two other cable operators for all of the unincorporated areas of Hillsborough County."[14]

6. As a preliminary matter, we are unpersuaded that the appropriate franchise area for purposes of effective competition is something less than the entire unincorporated areas of Hillsborough County, Florida. The County provides insufficient evidence to support its claim that Telesat has made an affirmative decision to redefine its franchise area. For example, the County has presented no statements from Telesat, or other evidence indicating a refusal to expand service to other areas within the franchise area. The County merely concludes that Telesat has decided not to serve the entire franchise area because Telesat has not yet initiated any extension of its system beyond the Primary Service Areas. We recognize that, by contract, Telesat is obligated to meet certain build-out requirements in the Primary Service Areas prior to expanding into other areas within its franchise. We also recognize that Telesat has, in fact, satisfied its build-out requirements in the Primary Service Areas. However, we remind the County that "[t]he fact that a franchise area has not as yet been filled out by construction of a system would not by itself be taken as redefining the service area."[15] Therefore, we find that the County has failed to sustain its burden of proof that Telesat has redefined its franchise area.

7. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[16] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[17] Telesat has met this burden.

8. Telesat appropriately relied on data reflecting the number of households as required by our rules.[18] Relying on this data, Telesat has submitted sufficient evidence demonstrating that its cable system, serving the unincorporated areas of Hillsborough County, Florida, its franchise area, serves 3,535 of the 195,271 households, or 1.8 percent of the households, within its franchise area.[19] Thus, we find that Telesat's system serving the unincorporated areas of Hillsborough County, Florida is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Telesat Cablevision, Inc. challenging the certification of Hillsborough County, Florida to regulate basic cable rates IS GRANTED.

10. IT IS FURTHER ORDERED that the certification of Hillsborough County, Florida to regulate Telesat Cablevision, Inc.'s basic cable service rates IS RESCINDED.

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[12] In its *First Order on Reconsideration*, the Commission clarified its definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164, 1880 (1993) (*"First Reconsideration Order")* . Generally, "[a] franchise area is the area a system operator is granted authority' (to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[13] *See* Response to Petition for Reconsideration, Exhibit C, Section (E).

[14] *See* Reply to Response to Petition for Reconsideration at 4. We also note that the County has issued non-exclusive franchises to two cable operators (Paragon and Cablevision.) Each operator is authorized to serve all of the unincorporated areas of Hillsborough County.

[15] *First Reconsideration Order, supra*, 9 FCC Rcd at 1181

[16] 47 C.F.R. § 76.906.

[17] 47 C.F.R. § 76.911(b)(1).

[18] *Third Recon. Order, supra.*

[19] Initially, Telesat stated that it served 3,565 of 219,421 "households" in its franchise area. This "households" data was apparently based on the number of housing units (occupied and vacant) in the unincorporated areas of Hillsborough County. In its supplement, however, Telesat submitted data demonstrating that there are 195,271 households (occupied housing units) in the franchise area, and that it currently serves 3,535 subscribers. As Telesat's supplement contains the appropriate housing and subscriber data, we have relied upon it for purposes of our analysis.

11. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION TELEGRAPH CO.	**CC Docket No. 78-97 (Phases I and II)**
Revisions to Tariff F.C.C. Nos. 240 and 258 filed with Transmittal No. 7346; Revisions to Tariff F.C.C. Nos. 268 and 269 filed with Transmittal Nos. 7347 and 7348; Revisions to Tariff F.C.C. Nos. 229, 240, 254, 255, 258, 260, 263 and 268 filed with Transmittal No. 7417	
Interconnection Arrangements Between and Among the Domestic and International Record Carriers	**CC Docket No. 82-122**

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1994; Released: January 4, 1995

By the Commission:

I. INTRODUCTION

1. In *TRT Telecommunications Corp. v. FCC*, 857 F.2d 1535 (D.C. Cir. 1988) *Remand Order*), the Court remanded to this Commission "for further consideration and explication" an Order that granted, in part, a petition filed by the Western Union Telegraph Company (Western Union).[1] In the Order remanded by the Court, the Commission directed interconnected carrier parties (ICPs) to pay Western Union the difference between the discounted rates the ICPs had actually paid and the full public rates subsequently prescribed by the Commission for interconnected telex and TWX service for the period from January 1, 1978 to July 24, 1979.[2] The Commission also required the ICPs to pay interest on these amounts. The *Remand Order* dealt solely with rates for outbound telex and TWX services, which were subject to Section 222 of the Communications Act, 47 U.S.C. § 222. Rates for inbound telex and TWX service, which we reviewed under Sections 201-205 of the Act, are not at issue here. For the reasons stated below, we now affirm the conclusions reached in the *Reimbursement Order*.

2. Soon after the *Remand Order* was issued, the Court at the Commission's request remanded a separate reimbursement claim arising out of the proceedings in Docket 78-97, Phase II, and CC Docket No. 82-122, which implemented the interconnection provisions of the Record Carrier Competition Act of 1981 (RCCA).[3] As it did in Docket 78-97, Phase I, the Commission ordered the ICPs to pay Western Union the difference between the discounted amounts the ICPs had actually paid and the full public rates subsequently ordered by the Commission for interconnected Telex and TWX service, but with certain adjustments. The Commission also required the ICPs to pay interest on these amounts. The Commission sought, and was granted, a voluntary remand to permit the Commission to give further consideration to the decisions under review in light of the Court's opinion concerning Docket 78-97, Phase I in the *Remand Order*. For the reasons stated below, we now affirm our previous decisions in Phase II of this proceeding.

II. BACKGROUND

3. Telex and TWX services allow subscribers to communicate with each other using teletypewriters. During the period at issue in this proceeding, Western Union provided facilities for domestic telex and TWX messages and the ICPs provided connections used for international telex and TWX traffic. In order to send a message overseas from a domestic point a subscriber used Western Union's facilities to access the international network. Both phases of CC Docket No. 78-97 deal with the proper rates for ICP-interconnected telex and TWX services.

A. CC Docket No. 78-97, Phase I

4. Prior to 1973, contracts between Western Union and the ICPs specified the rates the ICPs paid Western Union for interconnection with Western Union's domestic telex and TWX network.[4] Under these contracts the ICPs paid Western Union rates for telex equal to the rates Western Union charged the general public (the public rates). The ICPs paid rates for TWX that were 27 percent lower than the public rates. When these contracts expired, Western Union informed the ICPs that they would be charged public rates for TWX as well as for telex. The ICPs objected to this arrangement, however, and Western Union and the ICPs negotiated settlement agreements under which West-

[1] Western Union Telegraph Company, CC Docket No. 78-97 (Phase I), 102 FCC 2d 485 (1985) (*Reimbursement Order*), *recon. den.*, 1 FCC Rcd 829 (1986).

[2] The ICPs were TRT Telecommunications Corporation, FTC Communications, Inc., Western Union International, Inc., ITT World Communications Inc., RCA Global Communications, Inc., Graphnet Inc., International Relay, Inc., and Consortium Communications International. The ICPs are international record carriers, usually referred to as IRCs. In this proceeding, however, these parties filed joint pleadings under the rubric of the interconnected carrier parties. We therefore use that designation in this order.

[3] TRT Telecommunications Corp. v. FCC, No. 86-1270 (D.C. Cir., motion for remand granted November 23, 1988).

[4] *See* Western Union Telegraph Co., 68 FCC 2d 98 (1978)(*IRC Telex/TWX Order*).

ern Union charged the ICPs 5.5 percent less than the public rates for both telex and TWX service.[5] These agreements expired December 31, 1977.[6]

5. The dispute at issue in this proceeding arose when Western Union filed tariff revisions in December 1977 in anticipation of the expiration of the settlement agreements. One set of tariff revisions increased the public rates for telex and TWX, and another set of revisions set rates for the ICPs for both telex and TWX equal to the public rates. In March 1978, the Commission initiated an investigation of the proposed increase in Western Union's public rates, suspending them for the statutory 5-month period.[7] In a separate Order released in May 1978, the Commission rejected these tariff revisions as they applied to the ICPs' outbound rates and added to the ongoing investigation of Western Union's public rates the question "[w]hat formula for the division of charges for outbound [ICP]-interconnected Telex and TWX services should the Commission prescribe under Section 222(e) of the Act?"[8]

6. On July 24, 1979, an administrative law judge (ALJ) ordered the ICPs to pay Western Union prospectively the public rates for outbound telex and TWX services.[9] This *Interim Prescription Order* did not decide, however, what rates should have applied during the period from January 1, 1978 to July 24, 1979, when neither a carrier agreement nor a Commission prescription was in effect.

7. Subsequently, in the *Initial Decision* in the docketed investigation, a second ALJ formally concluded that Western Union's public inbound and outbound rates were unreasonable and discriminatory, and that Western Union incurred cost savings in providing service to the ICPs which justified giving the ICPs a discount of 25 percent off public rates.[10] The Commission reversed these findings, however, concluding that Western Union's public rates were lawful and that the ICPs were not entitled to any discount.[11] The Commission concluded, in part, that Western Union did not realize significant cost savings in handling ICP-interconnected telex traffic as compared with public telex traffic, and that the ICPs were not entitled to a discounted rate. The U.S. Court of Appeals for the Second Circuit denied the ICPs' petition for review of the *Interim Prescription Order* and the *Final Decision*.[12]

8. However, no rates had formally been in effect for inbound telex/TWX service to the ICPs between the date the settlement agreements expired and the date the Western Union inbound tariffs went into effect (January 1, 1978 to August 10, 1978), and no outbound rates were formally established from January 1, 1978 until the ALJ's interim rate prescription of July 24, 1979. During those periods, the ICPs, with the apparent exception of FTC Communications, Inc., paid the same 5.5 percent discounted rate which they had been paying under the expired settlement agreements. Thus, soon after the *Final Decision* was issued, Western Union filed a petition for reconsideration or clarification, requesting the Commission to order the ICPs to pay Western Union for the difference between the public rates that were effective and the discounted rates of 5.5 percent off the public rates that the ICPs actually paid Western Union during those time periods for both inbound and outbound services.

9. The Commission denied Western Union's request as to inbound rates in the *Reimbursement Order*.[13] However, it granted Western Union's petition as to outbound rates. The Commission stated that it had the authority under Section 222(e) to establish retroactively the outbound telex and TWX rates for the periods in question. It also decided that Western Union was entitled to recover the full public rate for outbound telex and TWX services from the ICPs for the period from January 1978 to August 1979, when neither a carrier agreement nor a Commission prescription existed that established telex and TWX rates among the parties. The Commission concluded that Western Union was entitled to reimbursement plus interest from the ICPs that took "unauthorized discounts" while using Western Union's telex and TWX services during that time period.[14] Finally, the Commission ordered Western Union to recompute the amount of its claim and file supporting data with the Commission within 30 days of the Order's release.[15]

10. The ICPs appealed these determinations. The Court affirmed that the Commission had the authority under Section 222(e) to order retrospective relief. The Court found, however, that, in ordering the ICPs to reimburse Western Union for outbound telex and TWX service the Commission relied on traditional ratemaking principles instead of division of revenues principles. It held that, under Section 222, Congress intended that Western Union and the ICPs should apportion, or divide, the revenues received for provision of telex and TWX services over their joint network. According to the Court, however, the Commission in several respects treated the ICPs simply as cus-

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[5] The settlement agreements between Western Union and the ICPs settled outstanding complaints filed with the Commission by Western Union against the ICPs in addition to fixing the rates to be paid by the ICPs to Western Union.

[6] *IRC Telex/TWX Order*, 68 FCC 2d at 101

[7] Western Union Telegraph Company, CC Docket No. 78-97, 67 FCC 2d 1420 (1978).

[8] *IRC Telex/TWX Order*, 68 FCC 2d at 124.

[9] *See* Western Union Telegraph Co., CC Docket No., 78-97, Memorandum Opinion and Order Prescribing Interim Division of Charges for Outbound International Record Carrier Traffic, FCC 79M-845, released July 24, 1979, (*Interim Prescription Order) review denied*. The Western Union Telegraph Co., CC Docket No. 78-97, FCC 79-812, released Dec. 13, 1979, *petition for review dismissed sub nom.* TRT Telecommunications, Inc., v. FCC, No. 79-2524 (D.C. Cir. Dec 19, 1980), *petition for review denied*, FTC Communications, Inc. v. FCC, 750 F.2d 226 (2d Cir. 1984).

[10] The Western Union Telegraph Company, Initial Decision in Phase I of CC Docket No. 87-97, 95 FCC 2d 922 (1982) (*Initial Decision).*

[11] Western Union Telegraph Co., CC Docket No. 78-97 (Phase I), FCC 83-478, 95 FCC 2d 881 (1983)(*Final Decision), petition for review denied*, FTC Communications, Inc. v. FCC, 750 F.2d 226 (2d Cir. 1984).

[12] FTC Communications, Inc., v. FCC, 750 F.2d 226 (2d Cir. 1984).

[13] *Reimbursement Order*, 102 FCC 2d at 496. The Commission reasoned that, unlike the outbound rates, which were intended to be based on agreement among all parties, it was within Western Union's power to unilaterally establish the inbound rates as those rates were governed by normal carrier initiated filing procedures. It declined to order the ICPs to pay Western Union any reimbursement because the hiatus period resulted from suspension of the tariff.

[14] *Reimbursement Order*, 102 FCC 2d at 501.

[15] *Id.* at 502.

tomers of Western Union, rather than as parties entitled to bargain with Western Union on an equal footing. It held that the Commission erroneously focused on Western Union's rates and possible cost savings, rather than on the revenues of either Western Union or the ICPs, and in doing so, incorrectly placed the burden of proof on the ICPs. It stated that the Commission incorrectly assumed that the ICPs should have been paying the full public rates all along, whereas the statutory scheme set forth in Section 222(e) required the Commission to independently determine whether the public rates the Commission found should govern the division of charges prospectively should be applied retrospectively. The Court concluded that this error infected both the Commission's decision to grant Western Union retrospective relief (*i.e.*, reimbursement at the public rates for the hiatus period) and to award interest on the amount of the ICPs' reimbursement. The Court found that "[f]or all its detailed discussion of its statutory *authority* to order retrospective relief, the Commission offered no independent justification of its *decision* to do so."[16] The Court therefore remanded to this Commission "for further consideration and explication."[17]

B. CC Docket No. 78-97, Phase II and CC Docket No. 82-122

11. Phase II of this proceeding was initiated after Western Union filed a new distance insensitive or "postalized" structure in place of its prior distance-sensitive rate structure.[18] Phase II covers the period from April 24, 1981, the date that Western Union's postalized rate structure became effective, to May 20, 1985, the date when the Commission terminated its Phase II investigation.

12. In December, 1981, prior to the release of the *Initial Decision*, the Record Carrier Competition Act of 1981 (RCCA) was enacted. The RCCA permitted Western Union to compete in the international record market and the ICPs to compete in the domestic market. To establish a competitive environment, the RCCA directed the Commission to require Western Union and the ICPs to provide full interconnection of their facilities at "just, fair and reasonable" rates. In April 1982 the Commission initiated CC Docket No. 82-122 to implement the RCCA's directives.[19] The *Docket 82-122 Interim Order* prescribed an interim 15 percent discount for carrier-to-carrier interconnection associated with end-to-end domestic service and for the domestic portion of outbound and inbound international service.[20] That discount was premised on the assumption that the discount reflected cost savings realized by Western Union. The Commission specified that this discount was an interim measure, and that it would be eliminated if, at the conclusion of the investigation in CC Docket No. 78-97, we found that no cost savings existed.

13. After the Commission released the *Final Decision* in CC Docket No. 78-97, Phase I, it reopened the proceedings in the Phase II investigation.[21] The Commission established a pleading cycle and noted that the scope of the Phase II investigation was limited to issues not then decided in Phase I.

14. In Phase II, the ICPs alleged that changes in the market occasioned by the RCCA and changes in switching technology produced cost savings for Western Union in providing service to the ICPs that the Commission had found in Phase I did not exist. The *Phase II Investigation Order* also solicited comments on the impact of deaveraging telex and TWX rates on the development of record service competition, and whether discounted telex/TWX rates for the ICPs would result in higher rates for public customers.

15. The Commission subsequently found that, under the postalized rate structure, Western Union did not realize any significant cost savings in providing service to the ICPs.[22] That Order also rejected the ICPs' arguments that the RCCA required a non-cost based discount from the public rates. The Order found that the RCCA required interconnection terms based as far as possible on cost, and did not envision a non-cost based ICP discount. The Commission further found that such a discount would inhibit competition by discouraging the ICPs from establishing their own domestic networks and entering the domestic record market as full competitors.[23]

16. The Commission denied the ICPs petitions for reconsideration of the *Phase II Termination Order*. [24] At the same time, the Commission granted, in part, Western Union's petition for action terminating CC Docket No. 82-122 and for the retroactive adjustment of the Commission's interim prescription in that docket.[25] The Commission concluded that Western Union was entitled to retrospective relief measured by the difference between the discounted rates paid by the ICPs under the *Docket 82-122 Interim Order* and the public rates, plus interest. We found that reimbursement was appropriate in view of the conclusions in the *Phase II Termination Order* that neither cost-based reasons nor non-cost based reasons justified a discount. We rejected the ICPs' argument that we lacked authority to order reimbursement finding that retroactive

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[16] *Remand Order*, 847 F.2d at 1555(emphasis in original).

[17] *Id.*

[18] *See Final Decision*, 95 FCC 2d at 888. Prior to the postalized filing, the rates had been based in part on distance. However, because the postalized rates were premised on the use of satellite transmission and computerized switching technology, length of haul was not considered as significant a cost factor in provision of telex and TWX services. Thus, under the postalized structure, subscribers pay the same rate regardless of the distance a message travels between its points of origination and termination.

[19] Interconnection Arrangements Between and Among the Domestic and International Record Carriers, CC Docket No. 82-122, 89 FCC2d 928 (1982) (*Docket 82-122 Interim Order), modified on recon.* 93 FCC2d 845 (1983) (*Interim Order Reconsideration).*

[20] *Docket 82-122 Interim Order*, 89 FCC2d at 960.

[21] The Western Union Telegraph Co., CC Docket No. 78-97, Phase II, FCC 84-399, released Aug. 10, 1984 (*Phase II Investigation Order).*

[22] The Western Union Telegraph Co., CC Docket No. 78-97, Phase II, FCC 85-265, released May 20, 1985 (*Phase II Termination Order), recon. denied,* FCC 86-189, released May 1, 1986.

[23] *Id.*

[24] The Western Union Telegraph Co., CC Docket No. 78-97, Phase II, FCC 86-189, released May 1, 1986 *Phase II Termination Reconsideration Order).*

[25] The Western Union Telegraph Co., CC Docket No. 78-97, Phase II, FCC 86-190, released May 2, 1986 (*Phase II Reimbursement Order) modified,* 2 FCC Rcd 2999 (1987)(reimbursement reduced to reflect subsequent Western Union rate increase), *clarified* 3 FCC Rcd 2597 (1988).

adjustment of the interim rate prescription was within our statutory authority. Nevertheless, we limited the effect of the reimbursement to exempt outbound international messages from the reimbursement computation because earlier Commission actions had effectively required the ICPs to flow through the 15 percent discount for these messages to end users.

17. The ICPs sought judicial review of the Commission's actions permitting Western Union to charge the ICPs the public rate for telex and TWX service and requiring the ICPs to reimburse Western Union for the interim 15 percent Phase II discount during the period June 1982 through August 1984. Western Union sought review of the Commission's decision exempting outbound traffic from the reimbursement requirement and of the subsequent modification of the ICPs' reimbursement requirement. At the Commission's request, these orders were remanded for further consideration in light of the Court's *Remand Order* in Phase I.

18. In the motion requesting the remand, the Commission noted important similarities existed in the two phases of Docket 78-97. In each phase, the Commission concluded that the ICPs were not entitled to discounts below Western Union's public rates. In each phase, the Commission ordered the ICPs to reimburse, with interest, amounts to Western Union for previous periods in which the carriers made discounted payments. The Commission observed, however, that Phase I was decided using the old Section 222, covered a "hiatus" period during which no rates were in effect, and was based on one set of evidence on rates. Phase II, on the other hand, was decided using the RCCA, covered a period in which a Commission order prescribed an interim discount for the ICPs and was based on evidence compiled after, and in addition to, the evidence in Phase I.

C. Commission Proceedings on Remand

19. In order to ensure a complete record on which to resolve this remand, we requested separate comments on the issues in each phase of the investigation. As to Phase I, parties were directed to explain how we should address the issues in the *Remand Order*.[26] Particularly, they were told to state the principles that should govern the division of revenues produced by telex and TWX service during the hiatus period. Parties were invited to supply additional information, if necessary, for the Commission to address the remanded issues. We also specifically directed commenters to attach to their comments any earlier pleadings that they believe would be relevant to a resolution of these issues. Comments as to Phase I were filed on May 8, 1992 by New Valley Corporation (New Valley, formerly Western Union Corporation) and TRT/FTC Communications, Inc. (TRT/FTC, formerly TRT Communications, Inc., and FTCC Communications, Inc.). The same parties filed replies on May 22, 1992.[27]

20. On May 22, 1992, the Commission issued a Public Notice requesting comments concerning the issues in Phase II.[28] As in Phase I, we invited parties to supply additional information, if necessary, in order to completely address the remanded issues. Also, as in Phase I, we specifically directed commenters to attach to their comments any earlier pleadings that they believe would be relevant to a resolution of these issues. Comments as to Phase II were filed on June 19, 1992 by New Valley (hereinafter, Western Union), TRT/FTC, Consortium Communications International, Inc.(CCI), and Graphnet, Inc. (Graphnet). On July 6, 1992, all but Graphnet filed replies.[29]

III. ISSUE ANALYSIS

A. CC Docket No. 78-97, Phase I

21. It is well-established that issues in Phase I before us must be decided consistently with former Section 222(e) of the Communications Act.[30] In remanding this proceeding to this Commission, the Court affirmed that we have statutory authority to order retrospective relief under Section 222. The Court concluded, however, that the *Reimbursement Order* did not adequately justify the particular retrospective relief the Commission granted. The Court did

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[26] Public Notice, CC Docket No. 78-97, 7 FCC Rcd 2366 (Com. Car. Bur. 1992)(*Phase I Public Notice)*.

[27] On June 12, 1992, TRT/FTC filed a motion to strike/motion for leave to file supplemental responsive pleading, which we deny. We note that neither the motion nor the supplemental pleading contribute any new arguments.

[28] Public Notice, CC Docket No. 78-97, Phase II and 82-122, 7 FCC Rcd 3462 (Com. Car. Bur. 1992) (*Phase II Public Notice);* Public Notice, CC Docket No. 78-97, Phase II and 82-122, 7 FCC Rcd 4049 (Com. Car. Bur. 1992).

[29] Motions to file Supplemental Comments were filed by TRT/FTC and New Valley Corp, which we deny.

[30] The version of Section 222 in effect during the period in question was repealed by the new Section 222, Part Two, of the Record Carrier Competition Act of 1981(RCCA), P.L.97-130, 95 Stat.h)1687. Former Section 222, however, remains the applicable statute for purposes of deciding this case, and is quoted below:

Section 222(e)(1) provides:

> In the case of any consolidation or merger of telegraph carriers pursuant to this section, the consolidated or merged carrier shall, except as provided in paragraph (2) of this subsection, distribute among the international telegraph carriers, telegraph traffic by wire or radio destined to points without the continental United States, and divide the charges for such traffic, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: *Provided however*, That in case the interested carriers should fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public interest, will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection.

Section 222(e)(3) provides:

> Whenever, upon a complaint or upon its own initiative, and after a full hearing, the Commission finds that any such distribution of telegraph traffic among telegraph carriers, or any such division of charges for such traffic,

not hold that the public rates were an impermissible measure of the retrospective relief that might be due Western Union nor did it hold that this Commission was barred from awarding interest on any relief granted under Section 222. Based on the record before us now, however, we conclude that the public rates are the best measure of the retrospective relief due Western Union for interconnected outbound service during the hiatus period. We also conclude that Western Union is entitled to interest on these amounts as a matter of equity, not as a penalty to be imposed on the ICPs.

1. Public Rates

22. The Court held that the *Reimbursement Order* erroneously focused on the proper rate Western Union should charge its ICP customers rather than on a proper division of charges between Western Union and the ICPs during that period.[31] The Court also stated that the Commission did not consider the earnings of either Western Union or the ICPs in providing outbound service, but rather focused on the possibility of cost savings to Western Union in providing service to the ICPs vis-a-vis its other customers.[32] In the *Phase I Public Notice*, we asked for comments from the parties concerning the principles they believed should govern the division of telex revenues during the hiatus period.

23. TRT/FTC claims that the *Remand Order* requires that any reimbursement requirement must be preceded by a division of revenues analysis.[33] It asserts that such an analysis would involve calculation of revenue requirements for Western Union and the ICPs and would require that the Commission revisit the conclusion that Western Union did not realize cost savings in providing interconnected service to TRT/FTC.[34] TRT/FTC argues that the Commission does not have the authority to order payments to Western Union absent an evidentiary record. It contends that relevant evidence is not in the record, and cannot now be developed.[35]

24. Western Union opposes attempting a division of revenues inquiry for the hiatus period, and disagrees with TRT/FTC's assertion that the *Remand Order* requires the Commission to employ a division of revenues approach.[36] It asserts, rather, that the proceeding was remanded for further consideration and explication, not for the Commission to conduct a division of revenues study.[37] Western Union agrees with TRT/FTC that the record does not contain sufficient evidence to perform an appropriate division of revenues analysis,[38] notwithstanding the fact that both sides have submitted data concerning their rates of return for the period at issue.[39]

25. Section 222 of the Act granted the Commission overall authority to effect a full disposition of the claims between the parties.[40] Absent injury to the public interest, and in the event no agreement between the parties is reached, the Commission is vested with authority to fully resolve the parties' dispute.[41] In order to achieve a full resolution of the dispute, we must determine a proper division of charges for the outbound service during the hiatus period. We believe full resolution of these issues is necessary to achieve a just, reasonable, and equitable result. We therefore decline TRT/FTC's invitation to leave this issue essentially unresolved by vacating this proceeding.[42]

26. Unfortunately, we must agree with the parties that the requisite data for either Western Union's or TRT/FTC's approach to dividing the outbound telex charges is not in the present record. TRT/FTC contends that ICP cost and revenue data is not in the record.[43] More importantly, it claims, Western Union was not previously required to submit cost data sufficiently disaggregated to show a cost difference..[44] Western Union agrees with TRT/FTC that the ICPs' cost data is not in the record.[45] Further, despite numerous opportunities for the parties to substantiate their

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which is being made or which is proposed to be made, is or will be unjust, unreasonable, or inequitable, or not in the public interest, the Commission shall by order prescribe the distribution of such telegraph traffic, or the division of charges therefor, which will be just, reasonable, equitable, and in the public interest, and will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers.

[31] *Remand Order*, 857 F.2d at 1554.

[32] *Remand Order*, 857 F.2d at 1555, *citing Reimbursement Order*, 102 FCC 2d at 495 n.16.

[33] TRT/FTC Comments at 4-8.

[34] *Id.* at 5-10.7

[35] TRT/FTC Comments at 8-9. The parties accuse each other of failing to provide the data needed for a proper divisions approach. Western Union claims TRT/FTC is estopped from claiming an inquiry is required because TRT previously objected to revealing its cost data. Western Union Comments at 13-15. On the other hand, TRT/FTC counters that TRT opposed Western Union's earlier request during discovery because its cost data were irrelevant under the methodology applied at that time. It contends that the data would be relevant to a division of revenues methodology under Section 222. *See* TRT/FTC Reply at 10-12.

[36] Western Union Reply at 3-6.

[37] *Id.*

[38] *Id.* at 10-15, *citing Remand Order*, 857 F.2d at 1554.

[39] *See, e.g.*, Western Union Comments at 16-22, *citing* International Record Carriers' Rates, 75 FCC 2d 726 (1980); Results of Preliminary Audits and Analysis of the Cost Studies for Docket 20778 (*Audit Report*); Western Union Comments at Appendix (Western Union's Proposed Findings of Fact and Conclusions, June 27, 1980, pp. 152-160); Western Union Reply at 12-14, *citing* the Commission's *Statistics of Communications Common Carriers*. TRT/FTC, however, claims that the *Audit Report* is extrinsic to the record, argues that the data are inaccurate and not at a usefully disaggregated level, and contends the report does not correspond to the hiatus period. TRT/FTC Reply at 12-18.

[40] *See* 47 U.S.C. Sec. 222(e)(3).

[41] *Remand Order*, 857 F.2d at 1546.

[42] TRT/FTC Comments at 7-9. TRT/FTC asserts that, if the Commission cannot perform a true, or technical, division of charges among the parties, the Commission may not resolve the proceeding in any way, but rather, must vacate its previous orders. We do not believe TRT/FTC's suggestion best comports with Section 222 purpose of ensuring uniform and impartial distribution of outbound telex traffic and charges among the ICPs. *See IRC Telex/TWX Order*, 68 FCC 2d at 118 n.33.

[43] TRT/FTC Comments at 8-12.

[44] *Id.* It claims that any evidence that Western Union experienced lower costs in providing interconnected service to the ICPs than it did in providing the same service to the public is pivotal to the disposition of this dispute.

[45] Western Union Comments at 13-15.

claims, neither party has done so. Absent the requisite information from the parties, we cannot divide the outbound telex charges using the divisions methodologies the parties suggest.

27. We considered requiring a third administrative hearing on the issue to obtain the requisite data. We do not believe, however, that yet another administrative hearing, if ordered, could produce the information the parties claim to be essential for a proper division of revenues approach. And, although each party has had ample opportunity, none have come forward with reliable data. Therefore, due to the lack of necessary information, we conclude that we are unable to perform a formal division of revenues analysis.

28. We can, however, accomplish the purpose of the Act, consistent with the Court remand, if we decide the dispute between the parties, or "do equity" in determining the proper level of compensation for these services when agreement between them fails. The agreement at issue failed January 1, 1978, when the previous agreement expired and no agreement or tariff was in force to govern Western Union's charges to the ICPs. No charges existed until July 24, 1979, when the ICPs were required to pay the public rates for outbound telex and TWX services on a prospective basis.

29. We conclude that applying the outbound public rates retrospectively for the hiatus period best achieves the directive of Section 222 to prescribe a just, reasonable, and equitable division of charges when agreement among the carriers fails. The record of this proceeding does not support a conclusion that any other "division of revenues" for the hiatus period would be more just, reasonable, equitable, and in the public interest than the public rates. The parties have had ample opportunity to supplement the record, and have been unable to do so. As Western Union notes, the *Remand Order* concedes that, prospectively, the Commission's approach in the *Final Decision* "may well have been justified for purposes of effecting a permanent resolution of the ongoing controversy...."[46] That decision was affirmed on appeal to the Court of Appeals for the Second Circuit, which found "substantial evidence to support the Commission's conclusion...."[47]

30. The *Remand Order* noted that this determination did not automatically apply retrospectively to the hiatus period but after further consideration we conclude that it should apply. In the absence of information that would be necessary to perform a division of revenues analysis -- which the parties agree has never been produced and is not now available -- our earlier findings supply the only rational basis for a resolution of this dispute. As we have noted, we concluded in the *Final Decision* that the public rates were reasonable as applied to the public and as applied to the ICPs on a prospective basis.[48] We also found that Western Union's costs for providing ICP-interconnected service did not differ from its costs for providing service to the public.[49] The *Remand Order* did not disturb these findings, nor does anything in the present record undermine them. We therefore conclude that applying the public rates to the hiatus period best achieves the just, reasonable and equitable resolution called for by Section 222 of the Act.

31. Moreover, we conclude that this result is equitable for all parties because we have found that the public rates are just and reasonable and fairly compensate Western Union. We are not engaged in an exercise of apportioning "blame" for the rate hiatus. Thus, our conclusion that equity compels application of the public rates during the hiatus period is not based on a finding that the ICPs were solely, or even mainly, at fault for the rate hiatus. We do not blame either party for the existence of a hiatus period. We must, however, prescribe charges that are "just, reasonable, equitable, and in the public interest" as Section 222(e) requires. The Commission prescribed such charges in the *Final Decision*. In the *Final Decision*, the Commission found that telex and TWX services are provided to the public and to the ICPs at no significant cost difference to the provider of those services. It concluded that the just and reasonable charges which were applied to the public users of the service should be considered just and reasonable when applied to the ICPs. These same considerations that led to the conclusion in the *Final Decision* that the public rates represented an appropriate division of revenues from outbound telex and TWX services prospectively, a conclusion that was affirmed by the Second Circuit, lead us to conclude that the public rates represent an appropriate division of revenues for the hiatus period. Nothing in the current record detracts from this conclusion.

2. Interest Award

32. In the *Remand Order*, the Court directed the Commission to revisit the issue of whether interest should be assessed under Section 222(e) on any amounts the ICPs may owe Western Union because of their failure to pay public rates.[50] The Court stated that the Commission had improperly relied on conventional ratemaking principles as a basis for awarding interest. It held that those principles, which were developed under Sections 201-205 of the Communications Act, 47 U.S.C. §§ 201-205, did not apply to the statutory scheme created in Section 222(e). The Court also held that the concept of "unlawful rates," which was the predicate of the Commission's argument that interest was required to make Western Union whole, was inapplicable. It stated that the Commission's interest award improperly placed the entire burden for the "rate gap" on the ICPs. Finally, it concluded that the Commission could not justify its interest award on the basis that the ICPs were "at fault" or that they took an "unauthorized discount" because, under Section 222(e), both parties were responsible for reaching agreement or, failing to do so, for petitioning the Commission for a prescription.[51] In the *Public Notice*, we asked for comments from the parties as to the propriety of an interest award.

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[46] Western Union Comments at 11, *citing Remand Order*, 587 F.2d 1554-55.

[47] FTC Communications, Inc., v. FCC, 750 F.2d at 230, n.5. The Second Circuit also affirmed the Commission's *Interim Prescription Order*, which required the ICPs to pay the full public rate for outbound service commencing in July 1979, the end of the hiatus period.

[48] *Final Decision*, 95 FCC 2d at 890-915.

[49] *Id.* at 915-920.

[50] *Remand Order*, 857 F.2d at 1553-54.

[51] *Id.* at 1554.7

33. TRT/FTC contends that the *Remand Order* held that the Commission had no authority to award interest under Sections 4(i) and 222 of the Communications Act when it invalidated the Commission's theory that an interest award was integral to any remedy necessary to make Western Union whole.[52] TRT/FTC argues that Western Union has identified no statutory basis to sustain an award of interest under the circumstances of this case.[53] TRT/FTC also claims that the requisite circumstances do not exist in this case that would allow an award of "prejudgment interest." It asserts that the ICPs' actions do not constitute the misconduct that is normally required for an award of prejudgment interest.[54] It adds that, even in cases where a wrong has been committed, prejudgment interest is denied if there are serious good faith disputes concerning final liability, if the fault is not one-sided, or if the disputed amount is unknown.[55] Finally, it argues that it would be arbitrary and capricious for the Commission to award prejudgment interest when the amount owed is unresolved and the methodology to be used has not been adopted.[56]

34. Western Union, however, argues that wrongdoing is not a prerequisite for an interest award, claiming that precedent favors the assessment of interest in divisions cases.[57] It claims that prejudgment interest has historically been included in retroactive divisions cases under the Interstate Commerce Act, the model of the Communications Act of 1934.[58] Further, it asserts, the ICPs were on notice from the beginning of the proceeding that the Commission might find Western Union was entitled to the full tariff rates, and that its position has consistently been that the ICPs should pay full public rates for interconnection services.[59]

35. We agree with TRT/FTC that it is not solely responsible for the failure of the parties to reach agreement on a proper division of charges. Nevertheless, as we have already stated, we are not engaged in an exercise of apportioning blame. Rather, it is our task to determine a just, reasonable, and equitable division of charges.

36. We cannot agree with TRT/FTC's assertion that we lack authority to award interest in these circumstances. Section 4(i) of the Act allows us to make such orders as are necessary to the execution of our responsibilities. We conclude that an award of interest is necessary to carrying out our responsibility to determine a just, reasonable, and equitable division of charges. We have decided that Western Union was entitled to receive from the ICPs charges equal to the public rates during the hiatus period. We could have declined to include an interest component. If we had selected that option, Western Union would have received a principal amount 14 years after the amount was due. Moreover, the ICPs would have been able to use those funds for the benefit of their shareholders for the duration of this proceeding. We believe that outcome would be blatantly unfair. Western Union and its shareholders have been unable to make use of the funds, incurring an opportunity cost over 14 years with respect to those funds. The ICPs, on the other hand, had the opportunity to benefit from using those funds. If we did not include an interest component, we would not be meeting our responsibility to ensure that our decision today fully discharges the Commission's obligation to "do equity" among the parties in this lengthy dispute. Section 4(i) thus provides the authority for an award of interest in this case.[60]

37. We have affirmed our conclusion that the public rates were the appropriate division of charges for the hiatus period for the same reasons that the public rates represented an appropriate division of charges prospectively. We also affirm our earlier decision to award interest in order to "make Western Union whole." We emphasize that our decision to award interest and thus make Western Union whole is based on equitable considerations, not on rate of return principles.[61] It is true that the duration of this proceeding could make interest the lion's share of any payment due Western Union as a result of the retrospective application of the public rates. Nevertheless, assessing interest on these amounts is not a penalty for delay or for taking an "unauthorized discount." On the contrary, our award of interest will effectuate the most fair, reasonable, and equitable division of charges possible and is fair to both Western Union and the ICPs.[62]

38. We do not wish to penalize any party to this proceeding. Clearly, however, to deny Western Union interest at this late date, after the long pendency of this proceeding,

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[52] TRT/FTC Comments at 12-16, *citing Remand Order*, 857 F.2d at 1554.

[53] TRT/FTC Reply at 18-20.

[54] TRT/FTC Comments at 14, *citing* Cronel Watch, S.A. v. Peterson State Bank, 565 F. Supp. 259, 265 (N.D. Ill. 1983); United States v. Consolidated Edison Co., 452 F. Supp. 638, 659 (S.D.N.Y. 1977), *modified in part on other grounds*, 580 F.2d 1122 (2d Cir. 1978).

[55] *Id.* at 14-15, *citing* Dow Chemical Company v. Dixie Carriers, Inc., 463 F.2d 120, 123 (5th Cir. 1972); Inland Oil and Transport Co. v. Ark-White Towing, 696 F.2d 321, 327 (5th Cir. 1983); Gulf Oil Corp. v. Dyke, 734 F.2d 797 (Tem. Emerg. Ct. of App. 1984).

[56] *Id.* at 15-16; TRT/FTC Reply at 18-20.P

[57] Western Union Reply at 24, n.63, *citing* Lodges 743 and 1746, International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. United Aircraft, 534 F.2d 432, 447 (2d. Cir. 1975), *cert. den.*, 429 U.S. 825 (1976); Mass. Law Reform Institute v. Legal Serv. Corp., 601 F. Supp. 415 (D.D.C. 1984); Arkadelphia Milling Co. v. St. Louis Ry. Co., 249 U.S. 134, 147 (1919); Baltimore and O.R. Co. v. United States, 279 U.S. 781, 786 (1929).

[58] *Id.*, *citing* Atlantic Coast Line Co. v. Arcade and A.R. Corp., 219 I.C.C. 741 (1937). Western Union likens its circumstances to those of the plaintiff in this early case, wherein the Interstate Commerce Commission awarded interest over the defendant's objections that prejudgment interest should not have been included where no damages were found, and where the applicable accounting rules did not specifically authorize interest awards.

[59] *Id.* at 26-27.

[60] We note, moreover, that TRT/FTC mischaracterizes our earlier award of interest to Western Union. Our decision to award interest cannot properly be analogized to a refund case under the ratemaking principles of Sections 201-205 of the Act, 47 U.S.C. §§ 201-205. We are directing the ICPs to pay Western Union charges that we find were properly due to Western Union but that the ICPs withheld. We are not directing the ICPs to remit to Western Union amounts that Western Union paid to the ICPs. Thus, there is no refund involved in this case.

[61] We can reach this conclusion because this is a division of revenues proceeding under Section 222, not a rate of return proceeding under Sections 201-205 of the Act. Indeed, if this were a rate of return proceeding, Western Union would be due no retrospective relief whatsoever for the hiatus period. It is well-settled that carriers may not recover revenue foregone during a suspension under Sections 201-205 of the Act, even if the suspended rate is later determined to be just and reasonable (as were Western Union's inbound rates in the *Final Decision*.)

[62] The ICPs continued to pay the rates established by the

would certainly penalize Western Union. We have concluded that the public rates properly should apply to the hiatus period. It is elemental fairness to grant interest to Western Union when the ICPs have had the use of this money for almost 15 years. By doing so, we are not assessing blame. Our conclusion that the ICPs should reimburse Western Union for discounts that the ICPs took during the hiatus period means only that the ICPs have had use of Western Union's money in the interim. In these circumstances, we adopt the commonly held view that interest is not a penalty, but is simply the price that one pays for using another person's money.[63] Therefore, using our broad equitable powers under Section 4(i) of the Act, 47 U.S.C. § 154(i), we direct Western Union to determine the amounts withheld by TRT/FTC for outbound service based on actual minutes billed, including interest calculated at the rate established by the Commissioner of Internal Revenue.[64] Interest should be calculated from the time Western Union billed for its services during the hiatus period.

39. We next address the methodology to be used in computing interest on the amounts to be reimbursed by the ICPs. We recently adopted a general policy that requires parties to common carrier proceedings to compute interest, when awarded, on a daily compounded basis.[65] This marked a departure from our previous practice which required simple interest computed at the prevailing IRS rate.[66] In adopting the new policy, however, we noted that unique circumstances of a particular case could warrant the application of simple rather than daily compounded interest.[67] Such circumstances exist in the present case. The Commission first directed the ICPs to pay interest to Western Union in the *Reimbursement Order*, which was released in 1985. Although silent on this point, the *Reimbursement Order* contemplated that the interest payments would be computed consistent with the Commission's then-existing practice of requiring simple interest. The Court subsequently remanded the proceeding to the Commission to consider, *inter alia*, whether the ICPs should be required to pay interest on a retroactive basis. The Court did not specify, nor have the parties raised in this remand proceeding, issues concerning the correct methodology to be used in computing interest. We believe it is appropriate to adhere to the practice contemplated by our initial *Reimbursement Order* of awarding simple interest. Notwithstanding the prolonged nature of these remanded proceedings, Western Union and the ICPs all have been diligent in presenting their respective claims to this Commission. Moreover, all parties have expended a considerable amount of time and resources in an effort to resolve the reimbursement issue. Under these circumstances, it would be inappropriate to depart from the Commission's *Reimbursement Order* and now require that interest be computed on a daily compounded basis in this case.

B. Docket No. 78-97, Phase II and CC Docket No. 82-122

40. In the *Phase II Public Notice*, we asked the parties to respond to four issues: (1) Whether the public rates that the Commission allowed to become effective for Western Union's telex and TWX facilities were appropriately applied to the ICPs during the June 1982 to August 1984 period, when the Commission's interim prescription was made effective in accordance with the RCCA's directive; (2) whether non-cost considerations justified lower rates for the ICPs than for the general public for the same services; (3) whether the Commission has authority under the RCCA to order reimbursements from the ICPs to Western Union for the June 1982 to August 1984 period; and (4) whether interest should be assessed on any amounts the ICPs may owe Western Union because of their failure to pay the public rates if principles under the RCCA are used to determine those amounts.

41. Western Union repeats arguments both from its earlier pleadings in Phase II and from its supplemental Phase I pleadings discussed above. For example, Western Union contends that the *Remand Order* does not require us to perform a division of revenues analysis in Phase II. Rather, Western Union argues, the public rates, without any offsets, are an appropriate measure of the reimbursement it is due from the ICPs.[68] Moreover, Western Union supports the position consistently taken in earlier Commission Orders that the RCCA does not warrant, much less require, granting the ICPs a discount from public rates on the basis of considerations other than cost.[69] Finally, Western Union argues that the RCCA and Section 4(i) of the Act, 47 U.S.C. § 154(i), provide ample authority for the Commission's actions in requiring the ICPs to reimburse Western Union and to pay interest on the reimbursement.[70]

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expired settlement agreements throughout the hiatus period. By doing so, they received the immediate benefit of the use of the disputed amounts, although they risked the possibility of eventually being required to pay those amounts to Western Union if the Commission found the public rates to represent a fair division of charges. Alternatively, they could have paid the public rates for the hiatus period, hoping to receive compensation -- including interest -- from Western Union at a later date if the Commission found the public rates not to represent a fair division of charges. Our decision to award interest in these circumstances makes the consequences of either option that was open to the ICPs as nearly identical as possible. We believe that this represents a fair and equitable resolution of this dispute.

[63] *See, e.g.*, Shaw v. Library of Congress, 747 F.2d 1469 (D.C. Cir. 1984), *rev'd on other grounds*, 478 U.S. 310, 322 (1986); Phillips Petroleum Co. v. Riverview Gas Compression Company, 513 F.2d 374 (5th Cir. 1975), *cert. denied sub. nom.*, Philips Petroleum Co. v. Adams, et. al., 423 U.S. 930 (1975); 47 C.J.S. Interest and Usury; Compensation for Use of Money § 12 (1982).

[64] We conclude that it would be inequitable to allow Western Union to calculate interest using the higher punitive interest rate established by the Internal Revenue Service for late payment of taxes that a taxpayer willfully does not pay, as this dispute involves no criminal wrongdoing on the part of the ICPs.

[65] Competitive Telecommunications Asso., 8 FCC Rcd 5550, 5553 *Memorandum Opinion and Order*, FCC 93-343 (1993) (general policy adopted that interest accrued after 1982 and awarded in common carrier cases shall be computed on a daily compounded basis).

[66] *Id.; See e.g.*, Annual 1988 Access Tariff Filings, 5 FCC Rcd 2885, 2886 (Com. Car. Bur. 1990) (refunds of overcharges ordered with simple interest).

[67] *Id.* at 5554 n.49.

[68] *See, e.g.*, Western Union Comments at 14-17.

[69] Western Union Comments at 46-47; *see also* Western Union Reply at 19.

[70] Western Union Comments at 48-54.

42. The ICPs likewise reiterate arguments that they have made previously in Phase II. CCI, for example, argues that the *Phase II Final Order's* modification of the interim prescription was beyond the Commission's statutory authority.[71] In addition, the ICPs argue for various reasons that they have previously advanced, that they were entitled to a discount from Western Union's public rates, on the basis of both costs and non-cost reasons.[72]

43. The ICPs also contend that Phase I of this proceeding is not dispositive of Phase II, principally because Phase II is governed by the RCCA and not by the prior Section 222 of the Communications Act.[73] Nevertheless, they assert that the Court's treatment of the interest issue in the *Remand Order* in Phase I is dispositive of that issue in Phase II. The ICPs argue, for essentially the same reasons advanced in their supplemental pleadings in Phase I, that the Commission should not assess interest on any reimbursement in Phase II.[74] Finally, Graphnet contends that the Commission's efforts in the telex investigation exemplify the unwieldiness of substituting regulation for market forces.[75]

44. When the Commission asked the Court to remand its decisions in Phase II, it was concerned that the similarities between the two phases might require it to modify its conclusions in Phase II if it modified its original conclusions in Phase I. However, after reviewing the *Remand Order* and the record in this proceeding, we decide that we need not modify any of the conclusions reached in Phase II. The parties' comments do not demonstrate that the *Remand Order* requires us to revise any of the Commission's earlier conclusions in Phase I, and in this we agree with the ICPs to the extent they argue that the *Remand Order* is not dispositive of Phase II. Moreover, unlike Phase I, we decided Phase II under the RCCA and on evidence compiled after, and in addition to, that considered in Phase I. As we have noted, we concluded, under the RCCA and on the record before us, that neither cost-based nor non-cost based factors justified discounted rates for ICP-interconnected telex and TWX traffic; that the RCCA did not require non-cost based discounts; and that we had adequate statutory authority to adjust our interim prescription and award interest on the amount of the reimbursement due Western Union from the ICPs. We required the ICPs to reimburse Western Union based on the foregoing conclusions because we found the public rates to be reasonable. We assessed interest as a matter of equity because the ICPs have had use of Western Union's money in the interim. Because the Phase I *Remand Order* does not require us to revise these conclusions we affirm our resolution of Phase II of the investigation.

IV. CONCLUSION

45. We have reviewed the comments, the replies, and the supporting materials filed in Dockets 78-97 and 82-122. We affirm our previous decisions concluding that Western Union was entitled to recover the full public rate for outbound telex and TWX services from the ICPs for the period from January 1978 to August 1979, when neither a carrier agreement nor a Commission prescription existed that established telex and TWX rates among the parties. We also find that Western Union was entitled to reimbursement plus interest from the ICPs for their use of Western Union's telex and TWX services during that time period. We also affirm our previous decisions in Phase II of this proceeding. We order Western Union to recompute the entire amount of its claim, and to file supporting data with the Commission within 30 days of this Order's release.

V. ORDERING CLAUSES

46. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i), 222(e) of the Communications Act, 47 U.S.C. §§ 154(i), 222(e), that the Commission's Orders ARE AFFIRMED.

47. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 222(e) of the Communications Act, 47 U.S.C. §§ 154(i), 222(e), that the Western Union Telegraph Company shall submit the information required in paragraphs 38, *supra*, not later than 30 days after the release of this Order.

48. IT IS FURTHER ORDERED that the Motion to Strike/ Motion for Leave to File Supplemental Responsive Pleading, filed by TRT/FTC Communications, Inc., on June 12, 1992, IS DENIED.

49. IT IS FURTHER ORDERED that the Motion for Leave to File Supplemental Reply Comments, filed by New Valley Corporation, on July 17, 1992, IS DENIED.

50. IT IS FURTHER ORDERED that the Opposition to Motion for Leave to File Supplemental Reply Comments, filed by TRT/FTC Communications, Inc., on July 30, 1992, IS DENIED.

51. IT IS FURTHER ORDERED that the Reply of New Valley Corporation to the Opposition to Motion for Leave to File Supplemental Reply Comments, filed by New Valley Corporation on August 7, 1992, IS DENIED.

52. IT IS FURTHER ORDERED that authority is delegated to the Chief, Common Carrier Bureau, as specified herein, to effect the decisions set forth above.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[71] *See* CCI Comments at 11, 14-16.
[72] *See, e.g.*, Graphnet Comments at 4-6; CCI Comments at 11-13; TRT/FTC Reply at 7-13.
[73] *See, e.g.*, Graphnet Comments at 4-6; CCI Reply at 2-4.
[74] *See, e.g.*, Graphnet Comments at 9; CCI Comments at 17-18; TRT/FTC Reply at 30-34;
[75] Graphnet Comments at 9.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SBC Cable Co.

Petition for Reconsideration
of the Certification of
Shelby County Board of Commissioners
Shelby County, Indiana
to Regulate Basic Cable Service Rates
(IN0133)

MEMORANDUM OPINION AND ORDER

Adopted: December 27, 1994; Released: December 28, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 9, 1993, SBC Cable Co. ("SBC") filed a timely petition for reconsideration challenging the certification of Shelby County Board of Commissioners, Shelby County, Indiana ("Board") to regulate rates for basic cable service and associated equipment.[1] In addition, SBC filed additional information in response to a Bureau request for clarification. The Board did not file an opposition to SBC's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6]

II. DISCUSSION

3. SBC argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in the unincorporated areas of Shelby County, its franchise area.[7] SBC states that it serves only 1,798 of the 8,114 households (that is, occupied housing units)[8] in Shelby County or 22.16 percent of the total number of households. As supporting documentation, SBC provides 1990 Census data[9] which shows that there are 8,114 households in SBC's franchise area in Shelby County. SBC explains that it arrived at this household number by taking the total number of households in Shelby County (14,761) and subtracting the total number of households in Shelbyville, (6,133) with which SBC has a separate franchise agreement, and the incorporated towns of Morristown (359) and St. Paul (155). This calculation yielded 8,114 households in SBC's franchise area. SBC also submits a computer print-out with sufficient information to indicate that SBC has 1,798 subscribers. This number was based on the total number of subscribers served by SBC's cable system (7,039) reduced by the number of subscribers who live in Shelbyville (4,705) with which SBC has a separate franchise as well as those subscribers who live in Hope, Indiana (536) which is located in another county. This calculation yielded a total of 1,798 subscribers. SBC also explains that one of the 1,798 subscribers actually represents a multiple dwelling unit single point billing account. In an attached chart, SBC demonstrates that this single

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[1] Shelby County Board of Commissioners, Shelby County, Indiana filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition" ("FCC Form 328") on September 23, 1993. The certification became effective on October 23, 1993.

[2] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905 (b)(1).

[8] As the Commission stated recently, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*) . The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population CP-1-1B, Appendix B at B-8.

[9] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Cable Operators' Petition for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

account actually represents an additional 11 billing units. Arguably, this brings the total of subscribers to 1,809. Nonetheless, a comparison of this number to the total number of households in SBC's franchise area yields a penetration rate of 22.29 percent. Finally, SBC provides a declaration under penalty of perjury by a responsible official certifying to the accuracy of the data included in the petition.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[10] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[11] SBC has met that burden. SBC appropriately relied on data reflecting the number of households as required by our rules.[12] Relying on this data, SBC has submitted sufficient evidence demonstrating that its cable system serving Shelby County, its franchise area, serves no more than 1,809 of the 8,114 households, or 22.29 percent of the households within its franchise area. Thus, we find that SBC's system serving Shelby County is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by SBC Cable Co. challenging the certification of Shelby County Board of Commissioners, Shelby County, Indiana to regulate SBC Cable's basic cable rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of Shelby County Board of Commissioners, Shelby County, Indiana to regulate the basic cable rates of SBC Cable Co. IS RESCINDED.

7. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[10] 47 C.F.R. § 76.906.
[11] 47 C.F.R. § 76.911(b)(1).
[12] *Third Recon. Order, supra.*

DA 94-1565

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Pacific Bell	)	W-P-C-6913
	)	W-P-C-6914
Applications for Section 214	)	W-P-C-6915
Video Dialtone Authority in	)	W-P-C-6916
Orange County, California,	)	
South San Francisco Bay,	)	
California, Los Angeles,	)	
California, and San Diego,	)	
California	)	

ORDER

Adopted: December 21, 1994 Released: December 21, 1994

Comment Date: January 6, 1995

By the Chief, Policy and Program Planning Division:

1. On December 9, 1994, the Chief, Common Carrier Bureau (Bureau), sent a letter to Pacific Bell (Pacific) requesting additional details about its pending applications for Section 214 video dialtone authority.[1] Pacific was requested to provide the information on or before 12:00 noon, December 16, 1994. Interested parties were invited to file comments on the data submitted in response to the request on or before 12:00 noon, December 23, 1994.

2. On December 16, 1994, Pacific provided a partial response to the Bureau's request. Pacific stated that it was unable to provide the cost-related data in the format requested because of the different computer models it uses in its business planning process. Pacific stated that it would provide the information as soon as possible but no later than December 23, 1994.

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[1] See Letter from Kathleen M.H. Wallman, Chief, Common Carrier Bureau, (dated Dec. 9, 1994) to Mr. Alan F. Ciamporcero, Executive Director - Federal Regulatory Relations, Pacific Telesis, 1275 Pennsylvania Avenue N.W., Suite 400, Washington, D.C. 20004.

3. On December 19, 1994, the National Cable Television Association (NCTA) filed a motion for an Extension of Time on the deadline for filing comments in response to Pacific's answers to the Bureau's request. NCTA states that an extension is necessary because Pacific provided only a partial response to the Bureau's request. Without Pacific's complete response, NCTA argues that it cannot comment on the response. NCTA states that since Pacific requires up to fourteen days to respond to the Bureau's request, it should have the same amount of time to respond to Pacific's response.

4. We do not routinely grant extensions of time.[2] We believe, however, that the public interest would be served by providing parties sufficient time to review the data. Thus, we grant NCTA's motion and extend the date for filing comments from December 23, 1994 until January 6, 1995.

5. Accordingly, IT IS ORDERED that NCTA's Request for Extension of Time IS GRANTED.[3]

Federal Communications Commission

James D. Schlichting
Chief, Policy and Program
Planning Division
Common Carrier Bureau

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[2] 47 C.F.R. § 1.46(a).

[3] This action is taken pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HORIZON CABLE I LIMITED PARTNERSHIP

Petition for Reconsideration
of the Certification of
Concord Township, Michigan,
to Regulate Basic Cable Service
Rates (MI0478)

By the Chief, Cable Services Bureau:

MEMORANDUM OPINION AND ORDER

Adopted: January 13, 1995; Released: January 17, 1995

I. INTRODUCTION

1. On November 15, 1993, Horizon Cable I Limited Partnership ("Horizon") submitted a timely petition for reconsideration challenging the certification of Concord Township, Michigan ("the Township") to regulate the system's rates for basic cable service and associated equipment.[1] The Township did not file an opposition.

2. Section 623(a)(4) of the Communications Act, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchising authority has actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the effective date of such certification.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6]

II. DISCUSSION

Horizon's Effective Competition Claim

3. Horizon argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the "homes" in Concord Township, its franchise area.[7] Horizon claims that it serves only 41 of the 874 "homes" in its franchise area, or 5 percent of the total number of "homes". In support of its claim, Horizon refers to a specific citation[8] to the 1990 Census. This citation is contained in a declaration under penalty of perjury from a responsible official certifying to the accuracy of the data in the petition.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[9] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, exists in the franchise area.[10] Horizon has failed to meet this burden. Horizon refers to the 1990 Census in its petition; but does not provide a copy of the relevant table or page from the data upon which it is relying. However, it appears that Horizon has inappropriately based its effective competition claim on the number of "housing units" (occupied and vacant) data. Our rules, however, require the use of data reflecting the number of "households" (occupied housing units) in the franchise area. *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994)(" *Third Recon. Order*").[11] As Horizon has

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[1] The Township filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition ("FCC Form 328") on September 30, 1993. Its certification became effective on October 30, 1993.

[2] Communications Act of 1934 § 623 (a)(4), 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The Cable Act (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)) and the Commission's rules (47 C.F.R. § 76.905 (a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the system. Communications Act of 1934, § 623 (l)(1)(A), 47 U.S.C. § 543 (l)(1)(A); 47 C.F.R. § 76.905 (b)(1).

[8] Horizon cites to 1990 Census of Housing, Bureau of the Census, U.S. Dept. of Commerce, 1990 CH-1-24, 1990 Census of Housing, General Housing Characteristics, Michigan, Table 1.

[9] 47 C.F.R. § 76.906.

[10] 47 C.F.R. § 76.911(b)(1).

[11] *Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994). As the Commission noted recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." The term "household" is defined by Census Bureau to include only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. The term "housing units", however, was defined by the Census Bureau to include both occupied and vacant units.

failed to base its effective competition claim on "household" data as required by our rules, we will deny its petition.

Other Matters

5. By letter dated March 17, 1994, the Township informed the Commission that it wished to withdraw its certification to regulate rates, claiming that Horizon is subject to effective competition. By letter dated October 21, 1994, the Commission informed the Township that, if it wished to withdraw certification, it must do so in the manner set forth in Section 76.917 of the Commission's rules. Despite several follow-up communications with the Township regarding its intent to withdraw, the Township has taken no action to seek withdrawal of its certification in the manner set out by the Commission's rules. Thus, as of the release date of this *Memorandum Opinion and Order*, the Township remains certified to regulate Horizon's basic cable rates. However, Horizon will only be required to submit its rate justification forms if the Township notifies Horizon that it is regulating rates.[12] Should the Township take the proper steps to withdraw its certification, the filing of any rate justification forms by Horizon will be unnecessary.

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Horizon Cable I Limited Partnership, challenging the certification of Concord Township, Michigan, to regulate its basic cable service rates IS DENIED.

7. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

8. IT IS FURTHER ORDERED that Horizon Cable I Limited Partnership SHALL FILE the required rate justifications on the appropriate forms with Concord Township, Michigan, within 30 days from the release date of this *Memorandum Opinion and Order* or 30 days from the date of receipt of notice from the Concord Township, Michigan, that it is regulating rates, whichever is later.

9. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[12] 47 C.F.R. § 76.930.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WHITE RIVER CABLEVISION

Petition for Reconsideration
of Certification of
the County of Bartholomew, Indiana
to Regulate Basic Cable Service Rates
(FCC Community ID No. IN0002)

MEMORANDUM OPINION AND ORDER

Adopted: January 17, 1995; Released: January 18, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 14, 1993, White River Cablevision ("White River") filed a timely petition for reconsideration[1] challenging the certification of the County of Bartholomew ("The County") to regulate rates for basic cable service and associated equipment.[2] In addition, both parties submitted supplements containing supporting documentation pursuant to a recent Commission Order.[3] On January 6, 1995, White River filed a response to the Bureau's requests for clarifying information.[4]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition as defined by the Communications Act of 1934.[5] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to such effective competition unless they have actual knowledge to the contrary.[6] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[7] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[8] Rate regulation is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition as defined by the Communications Act of 1934.[9]

II. DISCUSSION

3. White River argues that its cable system is subject to effective competition because it serves fewer than 30 per cent of the "households" in the unincorporated areas of the County of Bartholomew, its franchise area.[10] White River claims that it serves only 154 total basic subscribers of the 9,922 "occupied housing units" in its Bartholomew County franchise area, or less than 2 per cent of the total number of "occupied housing units." As supporting documentation, White River provides a copy of the 1990 Census data which shows that there are 24,192 occupied housing units in the County of Bartholomew. To calculate the number of occupied housing units in the unincorporated areas of the County, White River subtracts the number of occupied housing units in the incorporated areas of Clifford (110), Columbus (12,850), Edinburgh (152), Elizabeth (166), Hartsville (139), Hope (769), and Jonesville (84).[11]

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[1] White River's challenge, although clearly in opposition to Bartholomew's certification, does not state that it is a petition for reconsideration. We note, however, that this challenge was filed within 30 days of the date certification became effective as required by our rules, 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd, 5631, 5693 (1993) (*"Rate Order"*). The County does address White River's claim that the operator is subject to effective competition. However, the County's arguments are contained in its response to White River's motion to dismiss a cable programming service rate complaint (FCC Form 329). We will consider the County's claims in that proceeding.

[2] Bartholomew County filed its "Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Competition" (FCC Form 328) on October 12, 1993. The certification became effective on November 11, 1993.

[3] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[4] Letter form Daren A. Benzi to Matthew P. Zinn, Attorney for White River Cablevision (January 4, 1995).

[5] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4)

[6] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[7] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[8] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[9] 47 C.F.R. § 76.911(c).

[10] The 1992 Cable Act (Communications Act of 1934, § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 per cent of the households in the system's franchise area subscribe to the cable service of the cable system. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[11] Although White River states that it arrived at a total of 9,922 occupied housing units by subtracting the total number of occupied housing units for each incorporated area, it does not provide specific information demonstrating its calculation. Nonetheless, we note that in *Apollo Communications Corporation*, DA 94-1570 (released December 28, 1994), Apollo Communications, a cable operator, submitted information demonstrating this calculation. Thus, we will take official notice of the information contained in that filing because White River is serving the same franchise area as Apollo Communications.

White River also submits a computer print-out with subscriber information to support its claim that it serves 154 subscribers in its franchise area.

4. In its opposition to White River's motion to dismiss, and its supplemental pleading, the County argues that White River miscalculates its penetration level in violation of the Commission's rules. The County argues that, for purposes of determining an operator's penetration level, the Commission's rules require that the number of homes actually served must be compared to the number of homes the operator chooses to pass, not the number of homes the operator is authorized by franchise to pass.[12] The County argues that White River miscalculates its penetration level because it looks to the total number of "homes" in the unincorporated areas of the County, but does not contend that it passes or has made service available to all homes in the unincorporated areas of the County. In addition, the County claims that it has made a preliminary review of the areas in which White River offers service and determined that White River has systematically limited the area in which it offers service to a small portion of the northernmost part of the County. The County claims that White River has held a franchise to serve the entire County since 1989, and does not appear to be planning significant expansion of its service area. As supporting documentation, the County submits a copy of the franchise agreement, and a map of the County, which the County claims illustrates the portion of the County to which White River offers service. The County also provides an affidavit from a responsible official attesting to the authenticity of the copy of the map and veracity of the claims in the opposition papers.[13]

5. In reply to the County's opposition, White River argues that while it serves only a small portion of the County, it has repeatedly tried to expand its service beyond the current franchise area. White River also argues that its current service area has been limited, not by White River's conduct, but rather by surrounding competition from other cable operators which serve the areas directly adjacent to White River's service area. White River adds that the Commission's description of an "affirmative action" to limit the service area clearly precludes a situation such as this where the cable operator is limited by external competition and continues to attempt expansion.

6. As a preliminary matter, we are unpersuaded that the relevant franchise area for purposes of determining the presence of effective competition in this case is some area other than the unincorporated areas of the County of Bartholomew. Specifically, the County has not provided sufficient evidence demonstrating that White River has made an affirmative decision to restrict its service. The County does not submit evidence demonstrating an affirmative decision not to expand. (Such evidence could include, e.g., refusals of requests to expand service, or clear and unambiguous statements from the cable operator indicating an intent not to expand.) Rather, the County argues that, based upon its preliminary review, it has determined that White River has systematically limited the area in which it offers service to a small portion of the County, and that White River has held a franchise since 1989 and does not appear to be planning significant expansion of its service area. Such an argument, without more is insufficient to support a claim that a cable operator has made an affirmative decision to redefine its franchise area.

7. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[14] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, exists in the franchise area.[15] White River has met its burden. White River appropriately relied on data reflecting the number of households as required by our rules.[16] Relying on this data, White River has submitted sufficient evidence demonstrating that its cable system serving the unincorporated areas of the County of Bartholomew, its franchise area, serves 154 of the 9,922 occupied housing units, or less than 2 per cent of the households in its franchise area. Thus, we find that White River's system serving the County of Bartholomew is subject to effective competition. Accordingly, White River's petition is granted.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the petition for reconsideration filed by White River Cablevision challenging the certification of the County of Bartholomew, IN to regulate White River Cablevision's rates IS GRANTED.

9. IT IS FURTHER ORDERED that the certification of the County of Bartholomew to regulate White River Cablevision's basic cable service rates IS RESCINDED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[12] Bartholomew refers to our *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (August 27, 1993) (*"First Recon. Order"*). However, Bartholomew does not state the test correctly. The Commission stated that "generally a franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180.

[13] Affidavit of Ronald H. Taylor, Chairman, Bartholomew Telecommunications Commission, dated March 31, 1994.

[14] 47 C.F.R. § 76.906

[15] 47 C.F.R. § 76.911(b)

[16] *Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LARIBAY CABLEVISION OF AURORA, COLORADO

Petition for Reconsideration
of the Certification of
Avoyelles Parish, Louisiana,
to Regulate Basic Cable Service Rates
(LA0398)

MEMORANDUM OPINION AND ORDER

Adopted: January 17, 1995; Released: January 18, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 3, 1993, Laribay Cablevision of Aurora, Colorado, ("Laribay") filed a timely petition for reconsideration challenging the certification of Avoyelles Parish, Louisiana, ("the Parish")[1] to regulate rates for basic cable service and associated equipment. On August 19, 1994, Laribay filed a supplement to its original petition, pursuant to a recent Commission Order.[2] The Parish did not file an opposition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification 30 days from the date such certification becomes effective.[6] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[7]

3. Initially, we note that the confines of Laribay's franchise area are not clear. In one paragraph of its petition, Laribay states that it "serves Avoyelles Parish." In another paragraph, it states that it "serves a portion of the rural area of the Parish." In any event, Laribay argues that its system is subject to effective competition because the system serves fewer than 30 percent of the households within its franchise area.[8] Laribay claims that it serves only 73 of 7,164 "households" in the franchise area, or no more than one percent of the total number of households. As supporting documentation, Laribay submits a copy of a household trend report prepared by Kisatchie-Delta Regional Planning and Development District, Inc. which provides a 1990 estimate of 7,164 "households." According to Laribay's documentation, this appears to represent the total number of households in rural Avoyelles Parish. In addition, Laribay provides a computer printout as of November 25, 1993, which indicates that it serves 73 subscribers. Laribay acknowledges that this number does not include free subscribers. However, it provides no information regarding the nature or number of these "free" subscribers.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[9] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within its franchise area.[10] Laribay has not met this burden. First, Laribay has not sufficiently defined its franchise area. As noted above, Laribay initially states that it "serves Avoyelles Parish." On the same page of the same pleading, Laribay goes on to state that it "serves a portion of rural area of the Parish." Then in its supplement, Laribay offers household data which appears to reflect the total number of households for all of rural Avoyelles Parish. Laribay's inconsistent statements regarding its franchise area make it impossible for us to determine whether it faces effective competition. If, for example, Laribay's franchise area actually consists of only a portion of the rural area of

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[1] The Parish filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition on October 4, 1993. Its certification became effective on November 3, 1993.

[2] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[3] Communications Act of 1934 § 623 (a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4)

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See* also 47 U.S.C. § 543 (a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Cable Act (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)) and the Commission's rules (47 C.F.R. § 76.905 (a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the system. Communications Act of 1934, § 623 (l)(1)(A), 47 U.S.C. § 543 (l)(1)(A); 47 C.F.R. § 76.905 (b)(1).

[9] 47 C.F.R. § 76.906.

[10] 47 C.F.R. § 76.911(b)(1).

Avoyelles Parish, then its reliance on household data reflecting the entire rural area of Avoyelles Parish is inappropriate.

5. Next, we are concerned about Laribay's apparent failure to indicate the total number of subscribers to its cable service. Laribay claims that it has 73 subscribers, but goes on to state that this number does not include "free" subscribers. Laribay does not state the nature or number of the subscribers. Thus, it is unclear whether these "free" subscribers were appropriately excluded from the subscriber total.[11] As Laribay has not submitted sufficient information to support its effective competition claim, we will deny its petition. Should Laribay choose to submit more specific information in support of its effective competition claim it may do so by filing a petition for revocation pursuant to Section 76.914 of the Commission's rules.[12]

II. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Laribay Cablevision of Aurora, Colorado, challenging the certification of Avoyelles Parish, Louisiana, to regulate its basic cable service rates IS DENIED.

7. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

8. IT IS FURTHER ORDERED that Laribay Cablevision of Aurora, Colorado, SHALL FILE the required rate justifications on the appropriate forms with Avoyelles Parish, Louisiana, within 30 days from the release date of this *Memorandum Opinion and Order* or 30 days from the date of receipt of notice from the Avoyelles Parish, Louisiana, that it is regulating rates, whichever is later.

9. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[11] We requested clarification from Laribay regarding its franchise area including a copy of its franchise agreement as well as its "free" subscribers. Laribay did not respond to our request.
[12] 47 C.F.R. § 76.914

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 14, 1995

Released: January 18, 1995

Mr. Douglas R. Watts
Senior Vice President
Tele-Communications, Inc.
Terrace Tower II
5619 DTC Parkway
Englewood, CO 80111-3000

IN REPLY REFER TO:
DA 95-56

Dear Mr. Watts:

This letter is in response to your inquiry of December 12, 1994 seeking clarification of the new "going forward" rules[13] as they relate to channel additions on behalf of Tele-Communications, Inc ("TCI"). You ask whether the election between using Section 76.922(e)(2) ("initial going forward rules") and Section 76.922(e)(3) ("new going forward rules") for rate adjustments made after December 31, 1994 is made through written notification to the Commission or whether the election is made automatically through implementation of the rate adjustment. You argue that where the first rate increase after December 31, 1994 was set in motion prior to the release of *Going Forward Order*, it would be inequitable for the first rate increase in 1995 to constitute an automatic election between the initial going forward rules and the new going forward rules. Accordingly, you ask the Commission to clarify that the election by a cable operator under Section 76.922(e)(1) takes the form of a declaration by the cable operator of how it intends to implement the new going forward rules.

Your letter states that TCI issued notices in subscribers' billing statements indicating that rate adjustments would be made in the first quarter of 1995 for new programming added in 1994. You indicated in telephone conversations on December 28, 1994 and January 11, 1995 that TCI added these channels in October 1994 and November 1994. TCI was contractually bound to add these new channels prior to December 31, 1994 and these contracts were negotiated prior to the release of the *Going Forward Order*. You also stated that TCI added additional channels on December 31, 1994 and that TCI intends to increase rates using the new going forward rules to reflect these channels beginning in February 1995. You indicated that TCI generally was not contractually obligated to add these channels as of November 18, 1994.

We believe that an automatic election is preferable to requiring a written election because a written election would impose unnecessary administrative burdens on cable operators and regulators. Based on your recitation of your factual situation, we believe that you will not be prejudiced by automatic election between the initial and the new going forward rules. No prejudice should result because the Cable Services Bureau has issued a blanket waiver that preserves an operator's flexibility to elect between the initial and the new going forward rules that applies to your factual situation. Specifically, where an operator was contractually obligated, prior to the November 18, 1994 release of the *Going Forward Order*, to add new channels before December 31, 1994, the operator may make the rate adjustment for such channels under our initial going forward rules in the first quarter of 1995 while preserving the right to elect to use our new going forward rules for all channel additions made after December 31, 1994.[14] Based on your description of the facts, the rate increases for channels added in October 1994 and November 1994 fall within the terms of the waiver and you retain the option of using either the initial or the new going forward rules to adjust rates for later channel additions.

We believe our prior blanket waiver resolves your concerns about allowing an automatic election between initial and new going forward rules. Accordingly, we conclude the election of a rate adjustment methodology should be automatic upon the first rate adjustment in 1995 for (a) a channel added after December 31, 1994 or (b) for a channel added after the November 18, 1994 release date of the Going Forward Order where the operator was not contractually bound to add as of that date. At the time the operator makes this election, the operator may, but is not required to, include a notice in the operator's public inspection file that states which rate adjustment methodology it has chosen.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

[13] *See* Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking (the "*Going Forward Order*") , MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994).

[14] Letter to Peter Feinberg , DA 94-1508 (from Chief, Cable Services Bureau, released December 23, 1994); *See also* Letter to J. Christopher Redding, DA 94-1509 (from Chief, Cable Services Bureau, released December 23, 1994)

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 17, 1995

Released: January 18, 1995

Mr. Harold Brown, President
Gospel Music Television Network, Inc.
216 East Camden-Wyoming Avenue
Camden, DE 19934

Dear Mr. Brown:

This is in response to your letter dated November 16, 1994, asking that we amend a waiver of Section 76.922(d)(3)(x) of our rules granted previously by the Commission to the Gospel Music Television Network ("GMT").[1] That subsection requires cable operators to offset revenues received from programmers against programming costs in measuring programming expenses that may be treated as external costs.[2] First, you seek an extension of the waiver from the permitted five months to a total of 12 to 36 months. Second, you ask permission to pay operators sales commissions based on the amount of home shopping sales in each operator's zip code area rather than on the number of each operator's subscribers, as prescribed in GMT's Waiver Letter. For the reasons described below, we will grant in part and deny in part your request.

In support of your request that we extend GMT's waiver of offset requirements to a total of 12 to 36 months, you first note that the Commission possesses broad powers to grant experimental authorizations to develop marketing and other information toward the provision of new video or other services.[3] Second, you point out that we granted GMT's waiver subject to the same conditions as that governing a similar waiver granted previously to MTV Networks, Inc. ("MTV"), including the five month limitation.[4] You argue, however, that the shopping experiments of MTV and GMT fundamentally differ in that MTV is an established network with approximately 58 million subscribers while GMT has not yet launched its service. You thus argue that GMT requires a waiver of more than five months in order to generate viewership sufficient for GMT to follow through on its "new idea" to a "logical conclusion."

The Commission agrees that any waiver of offset requirements granted to GMT must provide GMT with sufficient opportunity to achieve its purpose, namely, to gather constructive data on the potential for home shopping of Christian products, as indicated in your letter. We are convinced that the previous waiver we granted to GMT of five months duration will not be adequate given your projection that you will not have a valid sample size of viewers until four months after your initial launch date. We note that you indicate in your letter that, assuming GMT launches service on January 15, 1995, the "logical starting point for [the home shopping] test" will be May 15, 1995, or four months later, because GMT will not be able to enlist a number of subscribers sufficient to properly conduct its marketing test until that date. Therefore, we will extend your waiver of offset requirements to a total of nine months, commencing upon GMT's introduction of home shopping programming. We have arrived at this period by adding five months, or the period initially granted to GMT as well as to MTV, to the four-month period you state GMT requires before it can logically begin its marketing experiment. We believe that tailoring your waiver in this manner will remove any remaining constraints on your ability to conduct the experiment.

In support of your request that we change the manner in which GMT may calculate the home shopping sales commissions, you again argue that the Commission has erred in placing restrictions on GMT's waiver based on the conditions and restrictions related to MTV's shopping experiment. Specifically, you assert that by requiring GMT to calculate sales commissions on an equal share per subscriber basis, as required of MTV, the Commission failed to recognize the "unique ability" of GMT, presumably to pay sales commissions based on sales amounts in each operator's zip code area. Finally, you argue that GMT's experiment will not cause harm to subscribers because the amount of commissions resulting from GMT's home shopping programming will be less than those generated by MTV's experiment.

The offset requirement of Section 76.922(d)(3)(x) of our rules is designed to protect subscribers' interests by assuring that any operator expenses permitted to be passed-through to subscribers as external costs reflect only the operator's net costs of obtaining programming. Notwithstanding that purpose, we determined in GMT's Waiver Letter that, given several important pre-conditions of your proposal and subject to certain restrictions, GMT's home shopping experiment would not be detrimental to consumers and therefore warranted a brief, limited waiver of offset requirements for a period of five months.

In requiring GMT to pay cable operators sales commissions on an equal share per subscriber basis, rather than based on sales commissions in each operator's zip code area, we again emphasized that this restriction helps to assure that GMT's proposal is not intended as a permanent plan to compensate operators for carriage of GMT. We believe that payment of sales commissions based on a cable operator's level of participation in the shopping test (i.e., sales amounts in the operator's area), without being subject to offset requirements, may undercut the purpose of Section 76.922(d)(3)(x) of our rules that requires offsetting of

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[1] *In re Gospel Music Television, Inc.* (Cable Services Bureau, released November 14, 1994) ("GMT's Waiver Letter").

[2] 47 C.F.R. § 76.922(d)(3)(x); *see also* Instructions for Line B1a, FCC Form 1210.

[3] *See, e.g.*, In the Matter of General Telephone Company of California, *Memorandum Opinion Order, and Authorization*, FCC 89-127, 4 FCC Rcd 5683, 5698 (1989), *remanded on other grounds*, 914 F.2d 285 (D.C. Cir. 1990), *modified*, 8 FCC Rcd. 8178 (1993).

[4] *In re MTV Networks, Inc.*, DA 94-842 (Cable Services Bureau, released August 2, 1994).

launch or carriage incentives paid by programmers to operators. We believe that requiring sales commissions from experimental part-time home shopping programming be based on an equal per subscriber share serves to protect subscribers' interests in fair rates by helping to ensure that the ultimate purpose of the payments is not simply to provide operators with compensation tied to their carriage of the program service or their level of participation in the market test. We note, however, that our existing rules permit new program services to reimburse cable operators for verifiable and reasonable promotional expenses associated with introducing the new program service. The reimbursements must be part of a reasonable marketing plan and it must not appear that the operator and the programmer have significantly altered reimbursement practices primarily in order to avoid offsetting.[5]

The Commission traditionally weighs the potential benefits against the potential detriments when considering requests for waivers of our rules, and seeks to place reasonable boundaries on the scope of any such waivers in order to ensure that the waiver is narrowly drawn and consistent with the statutory policy of the Cable Act.[6] In the context of requests for waivers of the offset requirements under our cable service rate regulations, we have repeatedly noted the potential harm to subscribers of allowing operators to receive sales commissions without having to offset those payments when calculating subscribers' rates.[7] In this light, we believe that the restrictions on your waiver described above achieve the necessary balance among the interests of subscribers, operators, and programmers.

Accordingly, we will grant in part and deny in part your request for amendment to the waiver of Section 76.922(d)(3)(x) granted November 14, 1994 by the Commission to GMT.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

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[5] *See In re The Disney Channel*, DA 94-520 (Cable Services Bureau, released May 23, 1994). We have attached a copy of this letter for your convenience.

[6] *See, e.g.*, General Telephone Company of California, 4 FCC Rcd at 5698, 5700.

[7] *In re The Home Shopping Network* (Cable Services Bureau, released May 9, 1994) at 1-2; *In re MTV Networks*, DA 94-842 (Cable Services Bureau, released August 2, 1994) at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLEVISION SYSTEMS OF SOUTHERN CONNECTICUT, LIMITED PARTNERSHIP	Bridgeport, CT Fairfield, CT Milford, CT Orange, CT
Appeal of Local Rate Order of the Connecticut Department of Public Utility Control	Stratford,CT Woodbridge, CT
Request for Stay of Local Rate Order of the Connecticut Department of Public Utility Control	

ORDER

Adopted: January 18, 1995; Released: January 19, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Cablevision Systems of Southern Connecticut, Limited Partnership ("Cablevision"), filed on September 13, 1994 an Appeal ("Appeal") of a local rate order ("Local Rate Order") of the Connecticut Department of Public Utility Control ("DPUC"), dated August 17, 1994, and served on Cablevision on August 23, 1994, for the communities of Bridgeport, CT.; Fairfield, CT.; Milford, CT.; Orange, CT.; Stratford, CT.; and Woodbridge, CT.[1] On September 13, 1994, Cablevision also filed a Request for Stay of the Local Rate Order.[2]

2. In the Local Rate Order, the DPUC established regulated rates for Cablevision's basic cable service and associated equipment, pursuant to the Cable Television Consumer Protection and Competition Act of 1992.[3] The DPUC also ordered Cablevision to issue refunds or credits to subscribers for those charges collected between September 1, 1993 and July 14, 1994, which were in excess of Cablevision's maximum permitted rates.

3. In its Appeal, Cablevision challenges only that portion of the Local Rate Order in which the DPUC reduced Cablevision's benchmark per channel rate on Line 121 of FCC Form 393 from $0.636, which Cablevision derived by interpolation from the Commission's benchmark tables, to $0.633, which the DPUC calculated using the Commission's benchmark formula.[4] This change resulted in a reduction of Cablevision's maximum permitted rate for basic service from $9.10 per month to $9.05 per month. Cablevision contends that it is entitled to use either the benchmark tables or the benchmark formula to calculate its benchmark per channel rate, and that the DPUC erred when it did not allow Cablevision to interpolate its per channel rate from the benchmark tables contained in FCC Form 393. Accordingly, Cablevision requests that the Local Rate Order be modified (1) to allow Cablevision to use the value of $0.636 as its benchmark per channel rate on Line 121 of FCC Form 393; and (2) to set its maximum permitted rate for basic service at $9.10 per month.[5]

II. STANDARD OF REVIEW

4. Under the Commission's rules, appeals of franchising authorities' local rate orders are reviewed by the Commission.[6] In ruling on an appeal of a local rate order, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[7] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in ren-

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[1] The DPUC filed an Opposition to Cablevision's Appeal ("Opposition") on September 27, 1994. Cablevision filed a Reply to the DPUC's Opposition on October 5, 1994.

[2] As discussed in paragraph 11, *infra* , this Request for Stay is dismissed as moot in light of the decision on the merits herein.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment, and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[4] As part of the rate review process, Cablevision submitted an FCC Form 393 ("Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment") to the DPUC on November 15, 1993. Local franchising authorities review the information contained in the FCC Form 393, or its successor forms, in order to determine cable operators' maximum permitted rates for basic service, associated equipment, and installations under the Commission's rate regulations. See *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket 92-266, 8 FCC Rcd 5631, 5770 (Rel. May 3, 1993) (*"Rate Order"*).

[5] Prior to July 14, 1994, Cablevision was charging subscribers $9.11 per month for basic service. In its Request for Stay, Cablevision states that it is prepared to refund the $.01 difference between the its prior rate of $9.11 and its maximum permitted rate of $9.10 "as soon as practicable." See *Petition for Stay Pending Review*, at 4.

[6] 47 C.F.R. §76.944.

[7] *Rate Order* at 5731; *Third Order on Reconsideration* in MM Docket 92-266, 9 FCC Rcd 4316, 4346 (Rel. March 30, 1994). As part of its Appeal, Cablevision has alleged that the DPUC has failed to demonstrate that Cablevision's rates were unreasonable. Pursuant to §76.937 of the Commission's rules, cable operators bear the burden of proving that their existing or proposed rates for basic service and associated equipment are in compliance with the Commission's regulations. Therefore, Cablevision's assertion that the DPUC failed to demonstrate that Cablevision's rates were unreasonable is insufficient to overturn the DPUC's determination. In the local ratemaking proceeding, Cablevision had the burden of proof on this issue, not the DPUC.

dering a local rate order.[8] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[9]

III. DISCUSSION

5. The sole issue raised in Cablevision's Appeal involves the calculation of its benchmark per channel rate on Line 121 of FCC Form 393. FCC Form 393 is the official form used by cable operators to determine whether their regulated rates for programming, equipment and installations are reasonable. FCC Form 393 is divided into three (3) separate, but interrelated parts. In Part II, the operator calculates its permitted programming rates, while in Part III, the operator calculates its permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period under review.

6. The operator's maximum permitted rates are derived by completing Parts II and III of FCC Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation or as of September 30, 1992. After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. The benchmark rate is determined by use of either the benchmark tables that are part of FCC Form 393 or by use of the benchmark formula.[10] If the appropriate benchmark for a particular operator falls between two numbers listed in the benchmark tables, then the operator may either interpolate the appropriate benchmark number or derive it using the benchmark formula.[11] If the per-channel rate exceeds the benchmark rate, the operator must reduce the per-channel rate to the benchmark rate or by 10%, whichever is less. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of FCC Form 393.

7. Cablevision claims that the DPUC unjustifiably substituted its calculation of Cablevision's benchmark rate using the Commission's formula in place of the benchmark rate which Cablevision derived by interpolating from the benchmark tables contained in FCC Form 393. The DPUC ordered Cablevision to issue additional refunds based upon the new, and lower, maximum permitted rate which the DPUC derived from the benchmark formula. The DPUC contends that a cable operator is not automatically entitled to the higher of the two values produced by the two methods of determining the benchmark per channel rate. The DPUC believes that a franchising authority should not be bound by a cable operator's choice of methodology where the calculation of the benchmark rate under the Commission's formula is available, because the formula provides a more precise and consistent regulatory analysis for all cable companies in Connecticut.[12]

8. A cable operator's benchmark per channel rate represents the rate that a comparable cable system that is subject to competition would charge. An operator derives its benchmark per channel rate by using either the benchmark tables in Attachment A to FCC Form 393, or the benchmark formula on page 33 of that form. The benchmark tables set forth various benchmark per channel rates, based upon the number of regulated channels and satellite-delivered signals for an operator's community unit, as well as the number of subscribers on an operator's system. If the appropriate benchmark for a particular operator falls between two numbers listed in the benchmark tables, then the operator may interpolate the appropriate benchmark per channel rate from the data in the benchmark tables. Alternatively, an operator may calculate its benchmark per channel rate by inserting its benchmark data (i.e., the number of regulated channels and satellite-delivered signals for the operator's community unit, and the number of subscribers on an operator's system) into the Commission's benchmark formula.[13]

9. The instructions for completing Line 121 of FCC Form 393, which are found on page 11 of FCC Form 393, explain how an operator must interpolate its correct benchmark per channel rate if the appropriate benchmark for a particular operator falls between two numbers listed in the benchmark tables. These instructions go on to state, "[a]lternatively, you may apply the FCC's benchmark formula to calculate your benchmark rate." Furthermore, the "Instructions for Identifying the Appropriate Benchmark Rate from the Tables in Attachment A" on page 22 of FCC Form 393, state, "[i]f either the total number of channels on the regulated tiers or the total number of satellite channels on those regulated tiers for your community unit does not equal the channels displayed in the selected table, you may determine your benchmark rate per channel by using the Commission's formula, or you can perform one of the following [interpolation] calculations." We find that it is clear from these two separate sets of instructions that cable operators may determine their benchmark per channel rate by employing either the Commission's benchmark formula or by interpolating the correct benchmark rate from the benchmark tables in Attachment A to FCC Form 393. Cablevision followed the instructions on the Commission's Form 393 when it chose to interpolate its benchmark per channel rate from the benchmark tables. The DPUC's insistence that Cablevision use the Commission's benchmark formula to calculate its benchmark rate is contrary to the Commission's instructions on FCC Form 393, which provide the operator, not the regulator, with the option of calculating its benchmark rate by using either the benchmark formula or the benchmark tables.[14] Accord-

[8] *Id.*
[9] *Id.*
[10] See discussion at para. 9, *infra*.
[11] *See* FCC Form 393, at 11, 22.
[12] In the Local Rate Order, the DPUC states its belief that the Commission "[c]learly . . . intended that interpolation would be used by operators unable easily to calculate precisely using the formula." Local Rate Order, at 12. As noted in paragraph 9, *infra*, this is not the Commission's intent.
[13] The benchmark formula is as follows: LNP = 2.3509 + 7.3452(RECIPSUB) - 0.8878(LNCHAN) + 0.1006 (LNSAT), where LNP = natural logarithm of the benchmark rate per channel; RECIPSUB = 1/number of households subscribing to the cable system; LNCHAN = natural logarithm of the number of channels in use in all regulated tiers of service; and LNSAT = natural logarithm of the number of satellite-delivered channels in all regulated tiers of service.
[14] The DPUC's argument that requiring the use of the bench-

ingly, we find that the DPUC's decision to substitute its calculation of Cablevision's benchmark rate using the Commission's formula for Cablevision's calculation of its benchmark rate, which Cablevision derived by interpolation from the benchmark tables, was unreasonable. In order to comply with the requirements of FCC Form 393, the DPUC must recalculate Cablevision's maximum permitted rate for the basic service tier using the value of $0.636 as Cablevision's benchmark per channel rate on Line 121 of FCC Form 393, and modify its Local Rate Order accordingly.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the Appeal filed by Cablevision Systems of Southern Connecticut, Limited Partnership is REMANDED to the Connecticut Department of Public Utility Control for resolution in accordance with the terms of this Order.

11. IT IS FURTHER ORDERED that, in light of the resolution of its Appeal herein, the Request for Stay filed by Cablevision Systems of Southern Connecticut, Limited Partnership IS DISMISSED as moot.

12. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

mark formula in all cases would promote regulatory consistency does not convince us to uphold its action in this case. By explicitly giving the operator the right to choose which method to use in calculating the benchmark, the Commission has indicated that the operator's interests in such a choice outweighs the hypothetical advantages of regulatory consistency.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI CABLEVISION OF CENTRAL CONNECTICUT	Bloomfield, CT East Hartford, CT Hartford, CT
Appeal of Local Rate Order of the Connecticut Department of Public Utility Control	Simsbury, CT West Hartford, CT Windsor, CT
Request for Stay of Local Rate Order of the Connecticut Department of Public Utility Control	

ORDER

Adopted: January 18, 1995; Released: January 19, 1995

By the Chief, Cable Services Bureau:

I. Introduction

1. TCI Cablevision of Central Connecticut ("TCI"), filed on September 23, 1994 an Appeal ("Appeal") of a local rate order ("Local Rate Order") of the Connecticut Department of Public Utility Control ("DPUC"), dated August 24, 1994, and released on August 25, 1994, for the communities of Bloomfield, CT.; East Hartford, CT.; Hartford, CT.; Simsbury, CT.; West Hartford, CT.; and Windsor, CT.[1] On September 29, 1994, TCI filed a Request for Emergency Stay of the Local Rate Order.[2]

2. In the Local Rate Order, the DPUC established regulated rates for TCI's basic cable service, associated equipment and installations, pursuant to the Cable Television Consumer Protection and Competition Act of 1992.[3] The DPUC also ordered TCI to issue refunds or credits to subscribers for those charges collected between September 1, 1993 and July 14, 1994, which were in excess of TCI's maximum permitted rates.

3. In its Appeal, TCI challenges only that portion of the Local Rate Order in which the DPUC reduced TCI's benchmark per channel rate on Line 121 of FCC Form 393 from $0.603, which TCI derived by interpolation from the Commission's benchmark tables, to $0.600, which the DPUC calculated using the Commission's benchmark formula.[4] After adjusting for inflation, TCI's adjusted benchmark per channel rate on Line 128 was $0.622, as opposed to $0.625 which TCI had calculated on its FCC Form 393. This change resulted in a reduction of TCI's maximum permitted rate for basic service from $9.15 per month to $9.08 per month. TCI contends that it is entitled to use either the benchmark tables or the benchmark formula to calculate its benchmark per channel rate, and that the DPUC erred when it did not allow TCI to interpolate its per channel rate from the benchmark tables contained in FCC Form 393. Accordingly, TCI requests that the Commission overturn those portions of the Local Rate Order which substitute a "formula" benchmark for an "interpolated" benchmark.

II. STANDARD OF REVIEW

4. Under the Commission's rules, appeals of franchising authorities' local rate orders are reviewed by the Commission.[5] In ruling on an appeal of a local rate order, the Commission willp not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering a local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[8]

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[1] The DPUC submitted an Opposition to TCI's Appeal on October 5, 1994.

[2] The DPUC submitted an Opposition to TCI's Request for Emergency Stay on October 14, 1994. As discussed in paragraph 11, *infra*, TCI's Request for Emergency Stay is dismissed as moot in light of the decision on the merits herein.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment, and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[4] As part of the rate review process, TCI submitted an FCC Form 393 ("Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment") to the DPUC on December 10, 1993. TCI then submitted an amended FCC Form 393 on June 23, 1994. Local franchising authorities review the information contained in the FCC Form 393, or its successor forms, in order to determine cable operators' maximum permitted rates for basic service, associated equipment, and installations under the Commission's rate regulations. See *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket 92-266, 8 FCC Rcd 5631, 5770 (Rel. May 3, 1993) (*"Rate Order"*).

[5] 47 C.F.R. §76.944.

[6] *Rate Order* at 5731 ; *Third Order on Reconsideration* in MM Docket 92-266, 9 FCC Rcd 4316, 4346 (Rel. March 30, 1994). As part of its Appeal, TCI has alleged that the DPUC has failed to demonstrate that TCI's rates were unreasonable. Pursuant to §76.937 of the Commission's rules, cable operators bear the burden of proving that their existing or proposed rates for basic service and associated equipment are in compliance with the Commission's regulations. Therefore, TCI's assertion that the DPUC failed to demonstrate that TCI's rates were unreasonable is insufficient to overturn the DPUC's determination. In the local ratemaking proceeding, TCI had the burden of proof on this issue, not the DPUC.

[7] *Id.*

[8] *Id.*

III. DISCUSSION

5. The sole issue raised in TCI's Appeal involves the calculation of its benchmark per channel rate on Line 121 of FCC Form 393. FCC Form 393 is the official form used by cable operators to determine whether their regulated rates for programming, equipment and installations are reasonable. FCC Form 393 is divided into three (3) separate, but interrelated parts. In Part II, the operator calculates its permitted programming rates, while in Part III, the operator calculates its permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period under review.

6. The operator's maximum permitted rates are derived by completing Parts II and III of FCC Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation or as of September 30, 1992. After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. The benchmark rate is determined by use of either the benchmark tables that are part of FCC Form 393 or by use of the benchmark formula.[9] If the appropriate benchmark for a particular operator falls between two numbers listed in the benchmark tables, then the operator may either interpolate the appropriate benchmark number or derive it using the benchmark formula.[10] If the per-channel rate exceeds the benchmark rate, the operator must reduce the per-channel rate to the benchmark rate or by 10%, whichever is less. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of FCC Form 393.

7. TCI claims that the DPUC unjustifiably substituted its calculation of TCI's benchmark rate using the Commission's formula in place of the benchmark rate which TCI derived by interpolating from the benchmark tables contained in FCC Form 393. The DPUC ordered TCI to issue additional refunds based upon the new, and lower, maximum permitted rate which the DPUC derived from the benchmark formula. The DPUC contends that a cable operator is not automatically entitled to the higher of the two values produced by the two methods of determining the benchmark per channel rate. The DPUC believes that a franchising authority should not be bound by a cable operator's choice of methodology where the calculation of the benchmark rate under the Commission's formula is available, because the formula provides a more precise and consistent regulatory analysis for all cable companies in Connecticut.[11]

8. A cable operator's benchmark per channel rate represents the rate that a comparable cable system that is subject to competition would charge. An operator derives its benchmark per channel rate by using either the benchmark tables in Attachment A to FCC Form 393, or the benchmark formula on page 33 of that form. The benchmark tables set forth various benchmark per channel rates, based upon the number of regulated channels and satellite-delivered signals for an operator's community unit, as well as the number of subscribers on an operator's system. If the appropriate benchmark for a particular operator falls between two numbers listed in the benchmark tables, then the operator may interpolate the appropriate benchmark per channel rate from the data in the benchmark tables. Alternatively, an operator may calculate its benchmark per channel rate by inserting its benchmark data (i.e., the number of regulated channels and satellite-delivered signals for the operator's community unit, and the number of subscribers on an operator's system) into the Commission's benchmark formula.[12]

9. The instructions for completing Line 121 of FCC Form 393, which are found on page 11 of FCC Form 393, explain how an operator must interpolate its correct benchmark per channel rate if the appropriate benchmark for a particular operator falls between two numbers listed in the benchmark tables. These instructions go on to state, "[a]lternatively, you may apply the FCC's benchmark formula to calculate your benchmark rate." Furthermore, the "Instructions for Identifying the Appropriate Benchmark Rate from the Tables in Attachment A" on page 22 of FCC Form 393, state, "[i]f either the total number of channels on the regulated tiers or the total number of satellite channels on those regulated tiers for your community unit does not equal the channels displayed in the selected table, you may determine your benchmark rate per channel by using the Commission's formula, or you can perform one of the following [interpolation] calculations." We find that it is clear from these two separate sets of instructions that cable operators may determine their benchmark per channel rate by employing either the Commission's benchmark formula or by interpolating the correct benchmark rate from the benchmark tables in Attachment A to FCC Form 393. TCI followed the instructions on the Commission's Form 393 when it chose to interpolate its benchmark per channel rate from the benchmark tables. The DPUC's insistence that TCI use the Commission's benchmark formula to calculate its benchmark rate is contrary to the Commission's instructions on FCC Form 393, which provide the operator, not the regulator, with the option of calculating its benchmark rate by using either the benchmark formula or the benchmark tables.[13] Accordingly, we find that the DPUC's decision to substitute its calculation of TCI's benchmark rate using the Commission's formula for TCI's calculation of its benchmark rate, which TCI

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[9] See discussion at para. 9, *infra*.

[10] FCC Form 393, at 11, 22.

[11] In the Local Rate Order, the DPUC states its belief that the Commission "intended that interpolation would be used by operators unable easily to calculate precisely using the formula." Local Rate Order, at p. 6, n.20. As noted in paragraph 9, *infra*, this is not the Commission's intent.

[12] The benchmark formula is as follows: LNP = 2.3509 + 7.3452(RECIPSUB) - 0.8878(LNCHAN) + 0.1006 (LNSAT), where LNP = natural logarithm of the benchmark rate per channel; RECIPSUB = 1/number of households subscribing to the cable system; LNCHAN = natural logarithm of the number of channels in use in all regulated tiers of service; and LNSAT = natural logarithm of the number of satellite-delivered channels in all regulated tiers of service.

[13] The DPUC's argument that requiring the use of the benchmark formula in all cases would promote regulatory consistency does not convince us to uphold its action in this case. By explicitly giving the operator the right to choose which method to use in calculating the benchmark, the Commission has indicated that the operator's interests in such a choice outweighs the hypothetical advantages of regulatory consistency.

derived by interpolation from the benchmark tables, was unreasonable. In order to comply with the requirements of FCC Form 393, the DPUC must recalculate TCI's maximum permitted rate for the basic service tier using the value of $0.603 as TCI's benchmark per channel rate on Line 121 of FCC Form 393, and modify its Local Rate Order accordingly.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the Appeal filed by TCI Cablevision of Central Connecticut is REMANDED to the Connecticut Department of Public Utility Control for resolution in accordance with the terms of this Order.

11. IT IS FURTHER ORDERED that, in light of the resolution of its Appeal herein, the Request for Emergency Stay filed by TCI Cablevision of Central Connecticut IS DISMISSED as moot.

12. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-97

In the Matter of

BellSouth Telecommunications, Inc. Revisions to Tariff F.C.C. No. 1	Transmittal No. 253
GTE System Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal No. 132
GTE Telephone Operating Companies Revisions to Tariff F.C.C. No. 1	Transmittal No. 938
Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 73	Transmittal No. 2413

ORDER

Adopted: January 12, 1995; Released: January 12, 1995

By the Deputy Chief, Tariff Division, Common Carrier Bureau:

1. On December 9, 1994, the Common Carrier Bureau (Bureau) released an Order suspending for one day and initiating an investigation of the permanent virtual collocation tariffs filed on September 1, 1994 by the Tier 1 local exchange carriers (LECs) subject to expanded interconnection requirements. The LECs' permanent virtual collocation tariffs became effective on December 15, 1994, subject to an accounting order.[1] The *Virtual Collocation Suspension Order* directed BellSouth Telecommunications, Inc. (BellSouth), GTE System Telephone Companies and GTE Telephone Operating Companies (GTE), and Southwestern Bell Telephone Company (SWB), *inter alia*, to delete from their virtual collocation tariffs references to individual case basis (ICB) pricing for rate elements that recover the cost of training LEC technicians to service interconnector-designated equipment that differs from the type of equipment the LEC uses. The Bureau ordered the foregoing LECs to file tariff revisions no later than December 23, 1994, to replace references to ICB pricing either with specific rates or time and materials charges.[2]

2. In response to the *Virtual Collocation Suspension Order*, BellSouth, GTE, and SWB filed tariff provisions proposing to delete from their virtual collocation tariffs references to ICB pricing for rate elements that recover the costs of training. These revisions are scheduled to take effect on January 14, 1995. In Transmittal No. 253, BellSouth proposes a schedule of specific charges, including charges for training classes (at basic, overtime, and premium rates), airfare, meals, and housing. In Transmittal Nos. 132 and 938, GTE proposes to replace ICB pricing with labor rates set forth elsewhere in its tariff. Additionally, GTE proposes that the interconnecting customer will be responsible for the arrangement and payment of training seminars, including tuition and course materials, and that travel expenses will be billed directly to the interconnecting customer. SWB's Transmittal No. 2413 proposes nonrecurring charges for training courses and material, lodging, intercity transportation, local transportation, expenses, and airport parking.

3. On December 30, 1994, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate BellSouth's transmittal. MCI asserts that BellSouth's proposed training rates, terms and conditions "do not guarantee interconnectors the lowest available rates." MCI Petition at 7. Specifically, MCI contends that BellSouth overestimated training-related expenses, *e.g.*, for airfare. MCI proposes that BellSouth charge the interconnectors only for the expenses that are actually incurred. *Id.* at 3-5. MCI also urges the Bureau to require BellSouth to provide the cost support on which it based its proposed rates for training. *Id.* at 5. Finally, MCI asserts that the Bureau should require BellSouth to give interconnectors the option of making training arrangements themselves. *Id.* at 5-6. No petitions were filed against GTE's and SWB's transmittals.

4. On January 9, 1995, BellSouth filed an opposition to MCI's petition. BellSouth asserts that its filing should be permitted to take effect without suspension or investigation because the transmittal complies fully with the Bureau's directive to remove references to ICB pricing. BellSouth Opposition at 1. BellSouth also claims that MCI's proposed approach would amount to ICB pricing to recover training costs. Finally, BellSouth defends the method it used to develop its rate for airfare/travel expense. *Id.* at 3.

5. The transmittals filed by BellSouth, GTE, and SWB raise the same issues as the permanent virtual collocation tariffs that were suspended for one day and made subject to investigation initiated in the *Virtual Collocation Suspension Order*. Despite BellSouth's claim that it complied with the Bureau's directive to remove ICB pricing, the Bureau must review BellSouth's transmittal in the context of its investigation to assess the reasonableness of the proposed rates. Therefore, the above-captioned transmittals are suspended for one day, until January 15, 1995, and will be subject to

[1] *See* Ameritech Operating Companies *et al.*, CC Docket No. 94-97, Order, DA 94-1421, released Dec. 9, 1994 (*Virtual Collocation Suspension Order*). In addition, the Bureau partially suspended for the remainder of the five-month suspension period certain LECs' rates to the extent they included overhead loading levels that were not justified by the record. *Virtual Collocation Suspension Order* at ¶ ¶ 1-2. The Bureau stated that it would designate specific issues regarding the LECs' virtual collocation tariffs and establish a pleading cycle for discussion of those issues in a subsequent Order. *Id.* at ¶ 3.

[2] *Id.* at ¶ 47.

the investigation initiated in the *Virtual Collocation Suspension Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

6. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to BellSouth Telecommunications Tariff F.C.C No.1, Transmittal No. 253, GTE System Telephone Companies Tariff F.C.C. No.1, Transmittal No. 132, GTE Telephone Operating Companies Tariff F.C.C. No.1, Transmittal No. 938, and Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 2413, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittals IS INSTITUTED.

7. IT IS FURTHER ORDERED that the petition to suspend and investigate filed by MCI Telecommunications Corporation IS GRANTED.

8. IT IS FURTHER ORDERED that BellSouth, GTE, and Southwestern Bell Telephone Company SHALL FILE tariff revisions within five business days of the release date of this Order to reflect this suspension.

9. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. BellSouth, GTE, and Southwestern Bell Telephone Company should cite the "DA" number of the instant Order as the authority for this filing.

10. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), BellSouth, GTE, and Southwestern Bell Telephone Company shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Deputy, Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc.
and
Eagle Telecommunications, Inc.

Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules — AAD 94-27

and

Eagle Telecommunications, Inc.

Petition for Waiver of Section 61.41(c) of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 1995; Released: January 5, 1995

By the Commission:

I. INTRODUCTION

1. On February 2, 1994, US West Communications, Inc. ("US West") and Eagle Telecommunications, Inc./Colorado, d/b/a PTI Communications, Inc. ("PTI/Eagle") (collectively, "Petitioners") filed a joint petition for waiver ("Joint Petition") of the definition of "Study Area" contained in Part 36, Subpart H, Appendix-Glossary, of the Commission's rules. US West proposes to sell 43 Colorado telephone exchanges to PTI/Eagle. This waiver would allow US West to remove these 43 exchanges from its Colorado study area, and allow PTI/Eagle to add these exchanges to its Colorado study area. PTI/Eagle also seeks a waiver of Section 61.41(c) of the Commission's price cap rules to exempt it from the price cap "all or nothing" rule and to allow PTI/Eagle to operate as a cost company.[1]

2. On March 2, 1994, the Common Carrier Bureau ("Bureau") released a public notice soliciting comments on the joint petition for waiver.[2] Comments in support of the request were filed by the National Exchange Carrier Association, Inc. ("NECA") and the Colorado Public Utilities Commission ("Colorado PUC").[3] No party objected to Petitioners' waiver request. At the request of Bureau staff, Petitioners provided additional financial and cost data concerning the proposed transaction.[4] On June 15, 1994, US West submitted a copy of the Colorado PUC Order approving the transfer of the 43 exchanges to PTI/Eagle subject to several conditions.[5] In this Order, we grant Petitioners' study area waiver petition and PTI's petition for waiver of Section 61.41(c).

3. As more fully explained herein, we also set forth more specific guidance concerning one of the three factors we consider in evaluating study area waiver requests: adverse impact on the Universal Service Fund ("USF"). We shall apply the clarification delineated in this decision prospectively to waiver requests filed after the release of this Order.

II. BACKGROUND

4. US West provides telephone service in 14 states, including Colorado. In Colorado, it serves 2.2 million access lines and 146 exchanges. PTI/Eagle operates 8 exchanges that serve approximately 7,700 access lines in Colorado. PTI/Eagle proposes to purchase 43 Colorado exchanges from US West. US West's 43 exchanges serve approximately 48,000 access lines.[6] US West states that it initiated this sale to ensure that the 43 exchanges receive the most efficient network service upgrades in compliance with ser-

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[1] Section 61.41(c) of the Commission's rules (the "all-or-nothing" rule) provides that when a non-price cap company acquires a price cap company, or any part thereof, the acquiring company shall become subject to price cap regulation. *See* 47 C.F.R. §61.41(c).

[2] Public Notice, 9 FCC Rcd 1018 (Com. Car. Bur. 1994).

[3] Reply Comments were filed by PTI/Eagle. On September 21, 1994, the Colorado PUC forwarded a letter to the Common Carrier Bureau requesting expeditious approval of the joint petition for study area waiver. Although these pleadings were filed late, we will treat this late filing as informal comments that will be considered in the interest of achieving a complete record. Letter from Robert J. Hix, Chairman, Colorado PUC, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, dated Sept. 21, 1994 (*ex parte* notification filed on Oct. 25, 1994).

[4] *Ex parte* letter from Aileen Piscotta, PTI, to William F. Caton, Acting Secretary, FCC dated June 29, 1994; *Ex parte* letter from Michael Crumling, US West, to William F. Caton, Acting Secretary, FCC dated Oct. 4, 1994 ("Oct. 4 Supplement"); *Ex parte* letter from Teresa Baer, PTI, to William F. Caton, Acting Secretary, FCC, dated Oct. 18, 1994; *Ex parte* letter from Brian Thomas, PTI, to William F. Caton, Acting Secretary, FCC dated Oct. 21, 1994. (Containing information originally forwarded to the FCC on July 27, 1994, and Sept. 23, 1994 ("Sept. 23 Supplement")).

[5] *Ex parte* letter from Mike Crumling, US West, to William F. Caton, Acting Secretary, FCC, dated Oct. 25, 1994 (Containing information originally forwarded to the FCC on June 15, 1994). *See also* Colorado Public Utilities Commission Order, Docket No. 93A-440T, adopted April 22, 1994 ("Colorado PUC Order"). The Colorado PUC approved the sale transaction subject to certain modifications that include: (i) a requirement that US West and PTI accelerate deployment of single-party service in their respective exchanges; (ii) a requirement that US West complete installation of Signalling System 7 ("SS7") in all remaining US West rural and urban exchanges by December 31, 1997; and (iii) that US West and PTI comply with certain accounting, depreciation, reporting, and other infrastructure development requirements.

[6] The following exchanges are part of the proposed sale and transfer between US West and PTI/Eagle: Akron, Otis, Wray, Yuma, Bristol Granada, Cheraw, Cheyenne Wells, Collbran,

vice standards mandated by the Colorado PUC.[7] PTI/Eagle states that it plans to complete a network modernization program that will replace three electro-mechanical switches, and substantially replace outside plant for more than 200 analog subscriber carrier systems that are currently in service. PTI/Eagle proposes to consolidate the 43 exchange areas into a new Colorado study area.

III. STUDY AREA WAIVER

5. A study area is a geographical segment of a carrier's telephone operations. Generally, a study area corresponds to the carrier's entire service territory within a state. Thus, carriers that operate in more than one state typically have one study area for each state, and carriers that operate in a single state have a single study area. Carriers perform jurisdictional separations at the study area level.[8] For jurisdictional separations purposes, the Commission adopted a rule freezing study area boundaries effective November 15, 1984.[9] If a carrier wishes to sell an exchange to another carrier, it must apply to the Commission for a waiver of the rule because the sale of an exchange would have the effect of changing the study area boundaries.[10] The Commission employs a three-prong standard in evaluating petitions seeking such a waiver: first, that the change not affect adversely the USF support program;[11] second, that the state commission having regulatory authority does not object to the change;[12] and finally, that the public interest supports grant of the waiver.[13]

Petition

6. US West seeks a waiver to remove the 43 exchanges it is selling to PTI/Eagle from its Colorado study area.[14] PTI/Eagle also seeks a waiver to include these 43 exchanges in its existing Colorado study area. Petitioners argue that the public interest requires that the Commission grant the requested waivers. In particular, PTI claims that its proposed modernization and upgrade will improve service quality. In addition, Petitioners state that changing their study area boundaries would not be in conflict with the Commission's original policy that froze study area boundaries because of concern that telephone holding companies would establish high cost exchanges within their existing service territory as separate but subsidiary companies to maximize high cost support. Petitioners argue that there is no connection or relationship (e.g., stock ownership, common directors) between the parties involved in this transaction.[15]

7. Petitioners estimate that grant of the study area waiver would increase annual support payments from the USF in connection with these exchanges by approximately $18.1 million.[16] US West states that it has been receiving no USF support before the sale of the 43 exchanges, and will receive none afterwards, because the average cost per loop of its Colorado study area is substantially below the national eligibility threshold for USF support.[17] PTI estimates that its USF draw would increase from approximately $820,000 to $18.9 million after it purchases and upgrades the 43 exchanges. It estimates that, of the $18.1 million USF increase, $14.5 million would be attributable to the

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Creed, Fowler, Holly, Ignacio, La Jara, La Veta, Lamar, Manassa, Manzanola, Mesa, Norwood, Ordway, Rocky Ford, Stratton, Two Buttes, Walden, Walsh, Weston, Antonito, Burlington, Campo, Center, Dolores, La Junta, Las Animas, Rangely, Saguache, Springfield, Branson, Gardner, Lake George, Maybell, Red Feather Lakes, San Luis, and Westcliffe. The Rangely and Lamar exchange have two wire centers. The Petition thus seeks waiver for 43 exchanges that contain 45 wire centers.

[7] Joint Petition at 2. The Colorado PUC adopted a rule that requires all multi-party lines to be upgraded to one-party service by the end of 1994. *See* Colorado Commission's Rules Regulating Telecommunications Service Providers and Telephone Utilities, 4 CCR 723-2 ("Rule 17"). US West received a waiver of this requirement from the Colorado PUC until December 31, 1998 for upgrades of some of its exchanges. In light of this pending transaction and because PTI offered to complete all service upgrades necessary for single-party service at all 43 exchanges by the end of 1995, the Colorado PUC has granted PTI a partial waiver of its rule requiring single-service availability until December 31, 1995. *See also* Colorado PUC Order.

[8] The phrase "jurisdictional separations," or "separations," refers to the process of dividing costs, revenues, and expenses between a carrier's state and interstate operations. *See generally* 47 C.F.R. §§ 36.1-36.741.

[9] 47 C.F.R., Part 36, Appendix-Glossary, definition of "Study Area" (1993). *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (*1984 Joint Board Recommendation*), adopted by the Commission, 50 Fed. Reg. 939 (Jan. 8, 1985) (*1985 Order Adopting Recommendations*). *See also* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*Study Area Notice*).

[10] 47 C.F.R. Part 36, Appendix-Glossary. *See also* 47 C.F.R. § 1.3.

[11] *See Joint Board Recommendation*, 49 Fed. Reg. at 48337, para. 65. The Commission created the USF to preserve and promote universal telephone service. *See* Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 96 FCC 2d 781 (1984). The USF allows LECs with high cost loop costs to allocate a portion of those costs to the interstate jurisdiction thus allowing the states to establish lower local exchange rates in those service areas. To qualify for USF support, a LEC's total company unseparated loop costs must exceed 115 percent of the nationwide average for such costs. *See* 47 C.F.R. §36.631.

[12] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*"Study Area Notice"*). In that notice the Commission described the factors that led to the present restriction on study area changes.

[13] *Memorandum Opinion and Order*, 9 FCC Rcd 3197 (Com. Car. Bur. 1994).

[14] US West states that it will make a permanent downward adjustment to its price cap indices to reflect the sale of these exchanges. *Ex parte* letter from Laura D. Ford, US West, to Richard Metzger, Acting Chief, Common Carrier Bureau, FCC, dated June 23, 1994 ("US West Letter").

[15] Joint Petition at 5-6.

[16] Joint Petition at 9-10.

[17] USF support is based on the average cost per loop in the study area, compared to the national average cost per loop. The study area cost per loop must be at least 115% of the national average cost per loop in order to qualify for USF support. The national average cost per loop is currently $239, so the eligibility threshold for USF support is $275, *i.e.*, $239 x 115% = $275. *See* 47 C.F.R. § 36.631, National Exchange Carrier Association, Inc., 1993 USF Report Section 1 at 3.

acquisition and $3.6 million would be attributable to the upgrading of the facilities.[18] Petitioners contend that their request is consistent with the original purposes of the USF and that the transfer of the 43 exchanges will not adversely affect the USF in any material way.[19]

8. Petitioners contend that existing network facilities in the 43 sale exchanges will require substantial plant construction in order to bring them in line with current service standards. For example, the petitioners state that the 43 exchanges are burdened with 7,000 multi-party lines, 23,000,000 feet of open wire, and more than 200 analog subscriber carrier systems.[20] Petitioners state that the Colorado PUC has adopted a rule that all multi-party lines be upgraded to single-party service by the end of 1994, and that in light of the impending sale, PTI has been granted an extension until the end of 1995 to upgrade all 43 exchanges to single-party service.[21] PTI/Eagle claims it has already accomplished one-party upgrades in four wire centers.[22] Petitioners state that service upgrades in the remaining wire centers would be accomplished at a much faster pace than would have been accomplished absent the sales agreement between US West and PTI/Eagle.[23] PTI/Eagle asserts that it is committed to upgrade all customers in the purchased exchanges to single-party service.[24]

9. Petitioners also assert that there are public interest benefits associated with the sale and transfer of the 43 exchanges. They maintain that the staff of the Colorado Commission and the Colorado Office of the Consumer Counsel have found that the proposed transaction is in the public interest because: (i) US West's customers in both the non-sale exchanges and sale exchanges will receive upgraded single party service faster under the proposed sale than without such a transaction; (ii) PTI/Eagle will improve service quality in the sale exchanges; and (iii) in comparison to US West, PTI/Eagle will dedicate more service personnel resources to the sale exchanges resulting in greater responsiveness to the customers.[25] In addition, Petitioners argue that, after the transfer, the 43 exchanges will be served by a company that specializes in rural service and is committed to ensuring that such service is provided on a fully upgraded basis.[26]

Discussion

10. *USF Impact.* For jurisdictional separations purposes, the Commission adopted a rule freezing all local exchange carrier ("LEC") study area boundaries as they existed on November 15, 1984.[27] The Commission took that action, in part, to ensure that LECs do not set up high cost exchanges within their existing service territories as separate study areas to maximize high cost support.[28]

11. As described in paragraph seven, *supra,* Petitioners indicate that the proposed transaction would cause an increase in the USF support payments received by the 43 sale exchanges. Petitioners estimate that USF support payments for the 48,000 access lines involved in this transaction would increase by $18.1 million annually, which translates into an increase in the annual per-loop USF assistance from zero to $377. The record shows that approximately $14.5 million of this $18.1 million annual increase would occur simply by virtue of the change in ownership and redefinition of US West's study area for the 43 sale exchanges, regardless of any efforts that PTI may subsequently undertake to improve telephone service.[29] The $18.1 million increase in USF support represents approximately 2.5 percent of the $725 million USF fund for 1994.

12. In addressing prior requests for waiver of study area boundaries related to the sales of exchanges, the Bureau noted the Commission's concern about the potential impact of such transfers on the size of the USF.[30] Our concern has been mitigated to some extent by our adoption of an indexed cap on the USF for the next 13 months, pursuant to a recommendation of the Joint Board.[31] The instant waiver request, however, presents the first case in which grant of the request will have a significant impact on the support that high cost LECs currently receiving USF support would, or could, draw in the future. We have not had occasion previously to apply the "adverse impact" standard in the context of transactions that would have a significant impact on the draws of other LECs from the USF.

13. Because of the indexed cap on the aggregate USF, an increase in the draw of any USF recipient necessarily reduces the amounts that other LECs receive from the USF. In the case of the proposed transfer to PTI/Eagle, the projected increase of approximately $18.1 million in the USF draw of PTI/Eagle will lower the USF support available for other high cost LECs by the same amount. Specifically, we calculate that if the impact on the USF caused by the US West/PTI transaction were to take effect in 1995, it

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[18] Joint Petition at Appendix B and October 4 supplement.
[19] *Id.* at 9-10.
[20] *Id.* at 2.
[21] *Id. See also* Colorado PUC Order, cited *supra* at n.5.
[22] Joint Petition at 3.
[23] *Id.* at 9.
[24] *Id.* at 4. PTI claims that its voice grade service would include touch tone capabilities and would provide at least 4800 baud for operation of a FAX or computer modem.
[25] *Id.* at 8.
[26] *Id.*
[27] *See* citations at n.9, *supra.*
[28] *See 1985 Order Adopting Recommendations,* 50 Fed. Reg. 939.
[29] *See* Oct. 4 Supplement.
[30] *See, e.g.,* Nevada Bell and Oregon-Idaho Utilities, Inc. Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary, of the Commission Rules, 9 FCC Rcd 5238, para. 14 (1994).
[31] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 9 FCC Rcd 334 (1993) ("Recommend Decision"), *adopted* by the Commission, 9 FCC Rcd 303 ("Interim Order"). The Commission adopted the Joint Board's recommendation for an indexed cap on the USF. *See id.* The Joint Board recommended, and the Commission adopted, interim rules that limit the rate of growth of the USF to the rate of growth in the total number of working loops nationwide. *Id.* That rate of growth has generally ranged from two percent to four percent per year. *Id.* This moderate growth rate will allow the USF to continue to provide adequate support to carriers serving high-cost areas, while preventing excessive increases in the USF. *Id.* In its *Interim Order,* the Commission also expressed its intention to review the USF rules to determine whether permanent changes are necessary. *Interim Order* at 303. We have undertaken that review. Amendment of Part 36 of the Commission's Rules and Establish of a Joint Board, *Notice of Inquiry,* FCC 94-199 (released August 30, 1994).

would reduce the USF receipts of small LECs[32] by more than $7.0 million. Other study area waiver requests, with similar potential for causing reductions in the USF receipts of small LECs, also are pending before us.[33] We are concerned that this trend could continue, with the result that substantial adverse effects upon recipients of the USF will occur if additional study area waivers are filed and granted, causing further reductions among the existing recipients of the USF.

14. We are therefore concerned about the aggregate effect on the USF of study area waiver requests. This concern, in light of the USF cap, leads us to conclude that we need to provide more specific guidance to be used in evaluating whether grant of a waiver request would result in undue adverse effect upon the USF. In light of the increasing number of study area waiver requests with significant potential for USF effect, we believe that no waiver should cause an annual aggregate shift in USF assistance in an amount equal to or greater than one percent of the total USF, unless the parties can demonstrate extraordinary public interest benefit. In order to prevent carriers from evading this limitation by disaggregating a single large sale of exchanges into a series of smaller transactions that in the aggregate have the same effect as the USF, the "one percent" condition must apply to all study area waivers granted to either carrier, as a purchaser or seller, pending completion of the current review of the USF program.[34]

15. We recognize that we might have chosen another criterion, including a different percentage, for evaluating whether the proposed transaction would adversely affect the USF, contrary to the public interest. The criterion we have selected will ensure that, during our ongoing review of the USF program, transfers of exchanges do not cumulatively lead to substantial, unexpected changes in USF support needed to maintain local rates at reasonable levels. We believe that this approach strikes a reasonable balance between the need to maintain adequate USF assistance to carriers serving high cost areas and our desire to avoid interfering with private business transactions. Our "adverse impact" standard, as clarified herein, also preserves the opportunity for parties to a particular transaction to show that the specific circumstances of the proposed transfer justify unconditional grant of the requested waiver.

16. In the instant case, however, we note that the parties negotiated this complex transaction and filed their petition for waiver based on their reasonable expectations that the transfer would meet the more general standard that the Commission has enunciated and applied in evaluating prior study area waiver requests. The same can be said of other requests for study area waivers currently pending before the Commission. In light of the likely degree of burden which application of the "one percent" guideline would impose on Petitioners and other parties with pending waiver applications, as well as their efforts in formulating a transaction that they believed would satisfy our existing precedents, it would be inequitable to apply the "one percent" guideline in these cases. Similarly, in light of these unique circumstances, we do not believe that the public interest would be served by denying the waiver request or by significantly limiting the impact of the proposed transaction on the USF. Applying the more general standard, the proposed transaction would not result in adverse impact on the USF.

17. We shall apply the "one percent" guideline for USF impact on a prospective basis only. Study area waiver requests filed after the release date of this order shall be subject to the condition that the transfer at issue and any other transfers involving either carrier, as a purchaser or seller, may not cause a shift in USF assistance in an amount equal to or greater than one percent of the total USF for the year in which the waiver request is submitted, unless the parties can demonstrate extraordinary public interest considerations that would warrant removal of this condition. For purposes of applying this guideline, the USF effect for the year must be computed on an annualized basis.

18. *State Commission Approval.* The Colorado PUC has approved the transaction and the petition is not opposed by any party. Moreover, the record also contains the Colorado PUC's support for the proposed sale and transfer of the 43 exchanges.[35] Accordingly, the second criterion for granting a study area waiver has been satisfied.

19. *Public Interest Findings.* The record demonstrates that under the Petitioners' proposal, existing and potential customers in the 43 sale exchanges will be better served by PTI/Eagle than by US West. In addition, Petitioners state that under the proposed transfer, PTI/Eagle would upgrade existing switching technology and commit substantial resources to replace and modernize the outside plant that serve these exchanges. PTI/Eagle's commitments to upgrade and modernize the facilities serving the 43 exchanges demonstrate significant public interest benefit from the proposed transactions.

20. *Conclusion.* Based on the record before us, we conclude that the three existing criteria for granting a study area waiver have been met in this case and that the waiver request should be granted. Nonetheless, while we have no reason to question Petitioners' estimates of USF impact, we are concerned that the waiver could lower the support received by other USF recipients by even more than $18.1 million if the Petitioners' estimates were to prove too low. In several past cases, the actual USF impact has risen far above the amount petitioners suggested when they sought study area waivers.[36] We therefore grant the requested study

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[32] Here we have defined small LECs as all LECs other than those owned by the Regional Bell Holding Companies, GTE, and Sprint.

[33] We note, for example, that US West has several study area waiver petitions pending before the Bureau that would draw down the USF available for other high cost carriers by approximately $12,000,000. *See, e.g.*, US West/Telephone Utilities of E. Oregon, Inc., Petition for Waiver of the Definition of Study Area, AAD 94-69 (filed on June 9, 1994); US West/Telephone Utilities of Washington Inc., Petition for Waiver of the Definition of Study Area, AAD 94-74 (filed on June, 30, 1994).

[34] In this context, the term "carrier" includes all affiliated carriers (*i. e.*, those carriers that are in common "control," as the term "control" is defined in Section 32.9000 of the Commission's rules, 47 C.F.R. § 32.9000).

[35] Letter from Robert J. Hix, Chairman, Colorado PUC, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, dated Sept. 21, 1994 (*ex parte* notification filed on Oct. 25, 1994).

[36] *See* Delta Telephone Company, 5 FCC Rcd 7100 (1990) (USF support grew from $82,500 in 1991 to $396,910 in 1993) US West and Gila River Telecommunications, Inc., 7 FCC Rcd 2161 (1992) (USF support escalated from $169,155 in 1992 to $492,300 in 1993).

area waiver, subject to the condition that any USF increase associated with the sale of the 43 US West Colorado exchanges to PTI/Eagle may not exceed $18.1 million per calendar year.

IV. PRICE CAPS WAIVER

Petition

21. PTI/Eagle also seeks waiver of the Commission's rules governing the acquisition of price cap companies by non-price cap companies. PTI/Eagle seeks a waiver of rule Section 61.41(c) to allow it to operate as a cost company, rather than a price cap company, despite its acquisition of existing price cap exchanges.

22. Section 61.41(c) of the Commission's rules provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.[37] Under this rule, PTI/Eagle's acquisition of the 43 US West exchanges obligates it to exit the NECA pools and become subject to price cap regulation. PTI/Eagle argues that the rule's application in this instance is contrary to the public interest and would not serve the purposes for which the rule was adopted.[38] PTI/Eagle contends that: (i) the Commission's concern to prevent cost shifting between affiliates is not at issue here; and (ii) the concern to prevent a company from using acquisitions and choosing a regulatory system to "game" the system is also not raised by the facts in this petition.

Discussion

23. The Commission's rules governing mergers and acquisitions provide that when a non-price cap company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[39] The rationale for this rule is stated in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift costs from its price cap affiliate to its non-price cap affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game the system" by, for example, building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level.[40] The Commission stated, however, that "in some cases, the efficiencies created by the purchase and sale of [a few] exchanges may outweigh the threat of "gaming the system." Such cases might justify narrow waiver of the all-or-nothing rule.[41]

24. We find that there is good cause to grant PTI/Eagle a waiver of the all-or-nothing rule. The first concern cited by the Commission, cost-shifting between affiliates, is not applicable in this case, because PTI/Eagle is not seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rule, allowing a company to "game the system," could be a source of concern because US West's sale of these high-cost exchanges will alter the network costs that comprise the basis for US West's current price caps.[42] US West has stated, however, that it will reduce its interstate revenue requirements to reflect the sale of the 43 exchanges to PTI/Eagle, and then adjust its price cap indices accordingly.[43] Grant of this waiver is conditioned on US West's compliance with this representation.

25. For the reasons described herein, we grant a waiver of the all-or-nothing rule for PTI/Eagle, subject to US West's adjusting its price cap indices as described in paragraph 24, above. For the present, we will continue to regulate PTI/Eagle under rate of return. Because we are waiving Section 61.41, PTI/Eagle need not withdraw from the NECA pools. We note that as with any other rate of return carrier, PTI/Eagle is free to elect price cap regulation in the future, provided it withdraws from the NECA pools.

V. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), and 201-202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 201-202, and Rule 1.3 of the Commission's rules, 47 C.F.R. §1.3 (1993), that the Joint Petition of US West Communications, Inc. and Eagle Telecommunications, Inc. for waiver of Part 36, Appendix-Glossary, of the Commission's Rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED, subject to the condition stated in paragraph 20 of this Order.

27. IT IS FURTHER ORDERED that the Petition of Eagle Telecommunications, Inc. for waiver of Section 61.41(c) of the Commission's Rules, 47 C.F.R. § 61.41(c), IS GRANTED, subject to the condition stated in paragraph 24 of this Order.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[37] 47 C.F.R. § 61.41(c)(2).

[38] Joint Petition at 12.

[39] Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *aff'd, National Rural Telecom Assoc. v. FCC*, 988 F.2d 174 (D.C. Cir. 1993), *further modification on recon.*, 6 FCC Rcd 4524 (1991) (*ONA Part 69 Order*), *second further recon.*, 7 FCC Rcd 5235 (1992).

[40] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706.

[41] *Id.* at 2706, para. 149, n.207.

[42] The generic issue that is posed more generally by this set of circumstances is being considered by the Commission in CC Docket No. 94-1. The Commission may require automatic adjustment to price capped rates to reflect the costs that are being removed from price cap regulation after reviewing the record in that docket.

[43] US West Letter, cited *supra* at n.15.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECABLE OF RADCLIFF, INC.

Petition for Reconsideration

of Certification of
Hardin County, Kentucky
To Regulate Basic Cable Rates
FCC Community ID No. (KY0330)

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1994; Released: January 3, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On April 4, 1994, TeleCable of Radcliff, Inc. ("TeleCable"), filed a timely petition for reconsideration of certification challenging the certification of Hardin County to regulate the system's basic service rates in Hardin County, Kentucky.[1] On August 16, 1994, Telecable filed a Supplement to Petition for Reconsideration pursuant to a recent Commission Order.[2] In addition, TeleCable filed additional pleadings in response to the Bureau's requests for clarifying information. Hardin County did not file an opposition to TeleCable's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchising authority has actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

3. TeleCable argues that its cable system is subject to effective competition because it serves less than 30 per cent of the households in Hardin County, its franchise area.[8] TeleCable claims that its franchise is for a defined portion of Hardin County. TeleCable states that it serves 201 of the approximately 740 "households" in the franchise area, or 27.1 per cent of the total number of "households". TeleCable explains that to determine the number of households it conducted an actual "household" count in March of 1994. As supporting documentation for its subscriber number, TeleCable provides a copy of a subscriber printout dated March 31, 1994, which demonstrates that TeleCable has 201 subscribers. Finally, TeleCable provides a declaration under penalty of perjury by a responsible official certifying to the accuracy of the data included in the petition.[9]

4. TeleCable claimed that, since it serves only a portion of the County, it could not rely on census data because census data would not be an accurate measure of the number of households in its franchise area. Therefore, TeleCable conducted a physical "household" count in its Hardin County franchise area. TeleCable explains that its physical household count included all homes in the company's Hardin County franchise area. According to TeleCable, occupied homes as well as homes that were vacant but intended for occupancy were included in the total household figure. This count left TeleCable with a penetration rate of 27.1%, based on the 740 total homes and 201 subscribers. TeleCable proposes that the total household count could be adjusted to exclude vacant housing units by applying the 3.3% vacancy rate it formulated from data reported by the Hardin County Water District

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[1] Hardin County filed a Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328"), with the Commission on February 28, 1994. Certification became effective on March 30, 1994.

[2] *Cable Operators' Petition for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition, 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 per cent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934 § 623(1)(1)(A), 47 U.S.C. § 543 (1)(1)(A); 47 C.F.R. §76.905(b)(1).

[9] Declaration of James S. Key, Vice President, dated August 26, 1994.

#1, which TeleCable claims serves its franchise area.[10] According to that data, TeleCable illustrates that there were a total of 8,121 non-commercial (home) meters in service, of which 7,851 bills to homes were provided in November, 1994. Telecable argues that this results in 270 vacant homes, or a vacancy rate of 3.3%. TeleCable claims this adjustment results in an occupied household count of 716, which leaves TeleCable with a penetration rate of 28%, based on the 201 subscribers TeleCable claimed earlier. Accordingly, TeleCable believes that it is subject to effective competition and exempt from regulation.

5. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[12] TeleCable has met this burden. Specifically, TeleCable has submitted sufficient evidence to support its effective competition claim. TeleCable states that its count of "households" actually represented a count of housing units (occupied and vacant units) within its franchise area. Our rules, however, require the use of data reflecting the number of "households" (i.e., occupied housing units) in the franchise area. *See Third Order on Reconsideration,* in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. (Order")*.[13] Although it initially relied on housing unit data, TeleCable has demonstrated that by applying a reasonably reliable vacancy rate, its penetration level is still below 30 per cent of the total number of occupied housing units in its franchise area. Considering that census data is not available, we will accept Telecable's showing incorporating the vacancy rate. TeleCable has submitted sufficient evidence to account for the number of occupied housing units in its franchise area. Thus, we find that TeleCable's system in Hardin County is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the petition for reconsideration filed by TeleCable, Inc. of Hardin County, Kentucky challenging the certification of Hardin County to regulate TeleCable's basic cable rates IS GRANTED.

7. IT IS FURTHER ORDERED that the certification of Hardin County, Kentucky to regulate TeleCable's basic cable service rates IS RESCINDED.

8. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321. §

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[10] TeleCable submitted the November, 1994 monthly statistical report for the Hardin County Water District #1. This report was provided by the Hardin County Water District # 1 to the Kentucky Public Service Commission.

[11] 47 C.F.R. § 76.906.

[12] 47 C.F.R. § 76.911(b).

[13] As the Commission stated in the *Third Recon. Order,* "[a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra.* The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term reflects only occupied housing units. The term "housing unit," however, was defined by the Census Bureau to include both occupied and vacant housing units.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 17, 1995

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON GTE'S OPEN NETWORK ARCHITECTURE PLAN AND WAIVER TO FILE INTRASTATE ONA TARIFFS CONCURRENTLY WITH FEDERAL ONA TARIFFS

CC DOCKET NO. 92-256

On January 4, 1995, the GTE Service Corporation and its affiliated domestic telephone companies (GTE) filed its Open Network Architecture (ONA) Plan pursuant to the *GTE ONA Order*, 9 FCC Rcd 4922 (1994). In that Order, the Commission applied to GTE the same regulatory framework of ONA and nondiscrimination safeguards that apply to the Bell Operating Companies (BOCs). The Commission required that GTE file an ONA plan, file federal and state ONA tariffs, and implement ONA requirements and nondiscrimination safeguards.

In its Plan, GTE describes its initial ONA services and how it will deploy these services. GTE also describes how it will comply with the Commission's comparably efficient interconnection requirements. Further, GTE describes how it will comply with the nondiscrimination safeguards that include rules governing use of customer proprietary network information, operations support systems, network information disclosure, and nondiscrimination in installation and maintenance.

In a separate filing, GTE requests a waiver of the requirement that all intrastate ONA tariffs be filed concurrently with the federal ONA tariff filings. GTE states that in order to meet the ONA requirement, it must prepare and file two interstate and forty-five intrastate ONA tariffs. GTE proposes to file intrastate ONA tariffs within thirty days after the effective date of the federal ONA tariffs. GTE states that the additional time will allow the Commission to review the interstate tariffs and, if the Commission requires any changes in the federal tariffs, GTE could incorporate the changes in the state tariffs. GTE states that its proposal will eliminate any possible need for amending the numerous state filings. GTE adds that its procedure should prove to be more efficient and more likely to lead to implementation of the tariffs throughout its service areas as quickly as possible.

Interested parties should file comments on GTE's ONA Plan and waiver request by **February 16, 1995**, and reply comments by **March 3, 1995**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the ONA Plan and waiver request can be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: January 4, 1995

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Blooston, Mordkofsky, Jackson
& Dickens
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Washington, D.C. 20037

Re: *American Telephone and Telegraph Company v. Lufkin-Conroe Telephone Exchange, Inc.*, File No. E-94-42

Dear Counselors:

This letter memorializes staff rulings issued during a telephone conference held in the above-referenced complaint proceeding on December 21, 1994. The conference was held to consider American Telephone and Telegraph Company (AT&T's) motion to compel answers to certain interrogatories (Motion).[1]

AT&T's Motion seeks to compel answers to its Interrogatories 2 and 3 regarding the amounts AT&T paid Lufkin for interstate access during the 1991-1992 monitoring period and the tax rates used in Lufkin's Form 492 for that period. Lufkin argues that the Motion should be dismissed as untimely because it was filed 42 days beyond the deadline established in Section 1.729 of the Commission's rules, 47 C.F.R. § 1.729. Lufkin notes that AT&T offered no "reason, excuse or good cause" for its failure to timely file its Motion. Lufkin also contends that compiling the requested information would be unduly burdensome and expensive.

In its opposition to Lufkin's motion to dismiss, AT&T explains that Lufkin's answers to interrogatories had been misdirected, that the interrogatories were relevant to the proceeding, and that Lufkin would not be prejudiced by the delay. AT&T urges the Commission to waive the time limitation in Rule 1.729, or, alternatively, grant AT&T's motion for leave to make a late filing.

The Commission has found in similar rate of return complaint proceedings involving these and other parties that the information requested is relevant. In the interest of compiling a full and complete record with which to resolve the pending complaint, we grant AT&T's motion to permit a late filing and direct Lufkin to respond to the subject interrogatories.

The information requested is relevant to the issues raised in this proceeding and only Lufkin has possession of the tax rates used in its Form 492. Lufkin has not shown that it would be unduly prejudiced by the grant of AT&T's Motion.

The parties agreed that Lufkin would provide the requested information within 30 days of this letter ruling. The parties also agreed to establish a schedule for filing briefs and reply briefs after the information requested in AT&T's interrogatories has been exchanged.

This letter ruling is issued pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 208, and authority delegated by Sections 0.291 and 1.733(c) of the Commission's rules, 47 C.F.R. §§ 0.291, 1.733(c).

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints
and Investigations Branch
Common Carrier Bureau

[1] AT&T filed its Motion on July 8, 1994 after receiving Lufkin-Conroe Telephone Exchange, Inc. (Lufkin's) responses and objections to AT&T's interrogatories on May 16, 1994. Lufkin filed a motion to dismiss AT&T's Motion as untimely on July 14, 1994. AT&T responded on July 22, 1994 with an opposition to the motion to dismiss and, in the alternative, a motion to permit a late filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LARIBAY CABLEVISION OF AURORA, COLORADO

Petition for Revocation
of the Certification of
Vernon Parish, Louisiana
to Regulate Basic Cable Service Rates
(LA0514)

MEMORANDUM OPINION AND ORDER

Adopted: December 27, 1994; Released: December 28, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On January 24, 1994, Laribay Cablevision of Aurora, Colorado ("Laribay") filed a petition challenging the certification of Vernon Parish, Louisiana ("Parish") to regulate rates for basic cable service and associated equipment.[1] On August 19, 1994, Laribay submitted supplemental information in support of its petition pursuant to a recent Commission order.[2] In addition, Laribay submitted a response to a Bureau request for clarifying information regarding Laribay's authorized area of service. The Parish did not file an opposition to Laribay's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7] Once the 30-day deadline for filing petitions for reconsideration has elapsed, cable operators may challenge the franchising authority's certification by filing a petition for revocation.[8] Regardless of its grounds, however, a petition for revocation does not authomatically trigger a stay of a franchising authority's power to regulate basic rates.[9]

II. DISCUSSION

3. Laribay states that its system serving a ward within Vernon Parish ("Ward 5"), its franchise area, is subject to effective competition because the system serves fewer than 30 percent of the households within the franchise area.[10] Laribay states that it serves 92 of the approximately 1,224 occupied housing units[11] in its franchise area, or approximately 7.5 percent of the occupied housing units in the

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[1] Laribay filed a pleading styled as a "petition for reconsideration." We note, however, that the Parish's certification was filed with the Commission on October 27, 1993, and became effective on November 26, 1993. Thus, a petition for reconsideration challenging Parish's certification must have been filed no later than December 26, 1993. *See* 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*). The Parish's petition was not filed until January 24, 1994, more than one month after the period for filing petitions for reconsideration has elapsed. Because the Parish's petition for reconsideration is untimely, it will be treated as a petition for revocation.

[2] *See Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also*, 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] 47 C.F.R. § 76.914.

[9] 47 C.F.R. § 76.914(d).

[10] The Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of a cable system that is not subject to effective competition may be regulated. One of the bases upon which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the franchise area subscribe to the cable system's service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. §543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[11] Both the Cable Act and the Commission's rules require that effective competition be demonstrated using data reflecting the number of households in the franchise area. *See* Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b) and (c). As the Commission has stated previously, "we presume that congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

franchise area. As supporting documentation, Laribay submits "household" data derived from the 1990 census information for Vernon Parish, provided by Kisatchie-Delta Regional Planning and Development District, Inc., which demonstrates that there are a total of 21,622 housing units (occupied and vacant), including 19,111 occupied housing units in the Parish. In addition, Laribay submits a letter from the Assessor for Vernon Parish which states that Ward 5 of the Parish has a total of 1,091 "rural improvements" and 294 mobile homes. The addition of these two figures yields a total 1,385 housing units. Explaining that the Parish does not have an occupied housing unit figure for Ward 5, Laribay states that it determined the approximate number of occupied housing units by deducting an 11.6 percent vacancy rate from the total number of housing units. Laribay states that this vacancy rate was determined by dividing the total number of occupied housing units in the Parish (19,111) by the total number of housing units in the Parish (21,622). By deducting the 11.6 percent vacancy rate from the total number of housing units in Ward 5, Laribay explains, that it arrived at an approximate number of 1,224 occupied housing units from its franchise area. In addition to its housing data, Laribay submits a computer printout with sufficient information to demonstrate that Laribay's serves a total of 96 subscribers, including four subscribers who receive "free" service.[12] Finally, Laribay submits a declaration under penalty of perjury from a company official.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[13] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, exists in the franchise area.[14] We find that Laribay has met this burden. In light of Laribay's claim that it was unable to acquire an occupied housing unit number with respect to Ward 5, we will accept Laribay's use of a vacancy rate for the Parish, as sufficient evidence of the approximate number of households in Laribay's franchise area in this case. Relying on this data, Laribay has submitted sufficient evidence demonstrating that it serves 96 of the approximate 1,224 households in in franchise area, or 7.8 percent of the total number of households. Thus, we find that Laribay's system serving Ward 5 of the Parish, is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for revocation filed by Laribay Cablevision challenging the certification of the Parish, Louisiana to regulate Laribay's basic cable service rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification granted to the Parish, Louisiana to regulate Laribay Cablevision's basic cable rates IS REVOKED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[12] Laribay's reference to 92 subscribers excludes the four subscribers receiving "free" service. Laribay does not provide an explanation of exactly what type of subscribers are receiving free subscribers. In light of its failure to support its deduction of subscribers, we find that they were inappropriately excluded for purposes of effective competition.

[13] 47 C.F.R. § 76.906.

[14] 47 C.F.R. § 76.911(b)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Internal Revenue Service — AAD 94-152
Request to Inspect and Copy
Commission Records

ORDER GRANTING EMERGENCY MOTION FOR STAY

Adopted: January 19, 1995; Released: January 19, 1995

By the Chief, Common Carrier Bureau

1. On January 17, 1995, BellSouth Corporation, on behalf of itself and its subsidiaries, and BellSouth Telecommunications, Inc. ("BellSouth"), filed an Application For Review, seeking review of a January 10, 1995 (DA-95-26), Order by the Chief, Common Carrier Bureau. This Order allows the Internal Revenue Service to inspect and copy certain FCC files pertaining to BellSouth and other local exchange carriers ("LECs") unless a judicial stay is obtained within ten working days pursuant to Section 0.442(d)(4) of the Commission's Rules, 47 C.F.R. § 0.442(d)(4).

2. That same day, BellSouth also filed an Emergency Motion For Stay, requesting that the Commission stay the effective date of the Bureau Order.

3. In light of the above, IT IS ORDERED that the effective date of the Bureau Order (DA-95-26) is hereby STAYED pending Commission action on BellSouth's Application For Review. Therefore, pending this review, the Internal Revenue Service shall not inspect any of the files pertaining to BellSouth and other LECs covered by the Order.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

A-R CABLE SERVICES-ME, INC.,
Petitioner,

v.

TOWN OF LISBON, MAINE (ME 0075),
Respondent.

Appeal of Local Rate Order

ORDER

Adopted: January 19, 1995; Released: January 20, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On July 7, 1994, A-R Cable Services-ME, Inc. ("A-R Cable") filed an appeal of the local rate order adopted June 7, 1994 by its franchising authority, the town of Lisbon, Maine ("Lisbon"). In the local rate order, Lisbon established A-R Cable's regulated rates for basic cable service and associated equipment provided by A-R Cable, as required by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act).[1] Specifically, Lisbon's rate order requires A-R Cable to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993. Lisbon opposes A-R Cable's appeal.

2. In its review of A-R Cable's Form 393, Lisbon approved A-R Cable's maximum permitted rates for installations of unwired homes and service calls, but ordered A-R Cable to keep its rates for basic service and other equipment and installations at the current levels, rather than at the higher, maximum permitted levels. A-R Cable argues that because of this misapplication of the Commission's rate regulations, Lisbon has improperly reduced A-R Cable's regulated revenues by setting its rates for converter boxes and remote controls below the maximum levels permitted under the benchmark regime and has imposed a refund liability that is greater than the level allowed under our rules. A-R Cable also appeals the local rate order because Lisbon did not verify A-R Cable's figures and calculations and did not release a "written decision." We consider each of these issues in turn.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[2] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[3] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[4] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[5]

A. Refund Offsets

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installation were reasonable during the time period from September 1, 1993 until May 14, 1994.[6] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[7] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its Sep-

[1] Under the 1992 Cable Act and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. Pub. L. No. 1002-385, 106 Stat. 1460 (1992); Communications Act, *as amended*, § 623(b), 47 U.S.C. § 543(b) (1993).

[2] *See* 47 C.F.R. § 76.944.

[3] *See Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266*, 8 FCC Rcd 5631, 5731(released May 3, 1993) (*"Rate Order"*); *Third Order on Reconsideration in MM Docket 92-266*, 9 FCC Rcd 4316, 4346 (released March 30, 1994) (*"Third Recon. Order"*) .

[4] *Id.*

[5] *Id.*

[6] To the extent that an operator has sought to take advantage of the refund deferral period available under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266*, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[7] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

tember 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of the Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from the calculation of a hourly service charge and application of that charge to different types of installations. Under our regulations, the maximum permitted rates are deemed to be reasonable, as required by the 1992 Cable Act.[8] Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[9]

6. If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. A franchising authority should not require the operator to set a particular rate for programming, equipment or installation at any rate less than its maximum permitted rate, even if its current or actual rate is below its maximum permitted rate. Instead, the franchising authority should allow the operator to charge up to its maximum permitted rates, as derived by Form 393.[10] In this proceeding, the City did not dispute either the validity of the figures used in A-R Cable's Form 393 or the accuracy of the calculations in the form. Therefore, Lisbon should allow A-R Cable to charge its maximum permitted rates, as derived by the Form 393.

7. After setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.[11] If an operator's aggregate revenues computed from its actual rates exceeded its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.[12] If the operator's aggregate revenues computed from its permitted rates exceeded its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by A-R Cable should be calculated based on this method.

8. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[13] For instance, in this case, Lisbon may not order A-R Cable to set its equipment and installation rates below maximum permitted levels. Further, Lisbon must offset or reduce any refunds it may order by the difference between the actual equipment and installation rates that A-R Cable charged and the maximum permitted rates that it could have charged during the applicable period of review.[14] According to A-R Cable's uncontested assertion, Lisbon has directed A-R Cable to charge less than its maximum permitted levels for certain components of its regulated service and to issue refunds without regard to the fact that some rates are below maximum permitted levels. We are remanding this case to Lisbon so that it can reconsider its ruling in a manner consistent with our findings.[15]

B. Independent Review

9. A-R Cable next contends that Lisbon violated the Commission's rules by its acceptance, without independent verification, of A-R Cable's calculations on its FCC Form 393.[16] While a local franchising authority is free to seek further verification of the information presented in an operator's Form 393, or to require the operator to submit additional information, nothing in our rules requires the local authority to do so.[17] In fact, the local authority's ability to determine whether an operator has met its burden of demonstrating the reasonableness of its rates is in great measure dependent upon accurate self-reporting by operators. Lisbon therefore did not err in accepting the figures reported by the operator.

C. Written Decision

10. A-R Cable also contends that Lisbon's rate order should be remanded because there was no "written decision." Lisbon's "written decision" was a one page document, signed by the Town Council, that merely listed the prices that A-R Cable was required to charge. A-R Cable correctly notes that Commission rules require a written decision by the local franchising authority.[18] Moreover, where the franchising authority prescribes a rate, as Lisbon did here, the written decision must affirmatively demonstrate why the operator's proposed rate is unreasonable and

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[8] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[9] If a franchising authority required an operator to set its rates for equipment and installation below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installation at levels below actual cost.

[10] An operator is not required, however, to raise its rates to the maximum permitted level. An operator may voluntarily choose to charge less than the maximum permitted rate.

[11] *See* 47 C.F.R. § 76.942.

[12] *See Third Recon. Order*, 9 FCC Rcd at 4353 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

[13] *See Rate Order*, 8 FCC Rcd at 5731; *Third Recon. Order*, 9 FCC Rcd at 4346.

[14] *See Third Recon. Order*, 9 FCC Rcd at 4353.

[15] *See TCI Cablevision of North Central Kentucky, Inc.* (Mount Washington, KY), DA 94-1479 (Cable Services Bureau, released December 14, 1994).

[16] A-R Cable's argument could lead one to infer that it has problems with its own calculations.

[17] *Rate Order*, 8 FCC Rcd at 5709 (". . . the franchising authority *can* solicit additional information from the cable operator . . . "(emphasis added)).

[18] 47 C.F.R. § 76.936; *Rate Order*, 8 FCC Rcd at 5715-16.

why the prescribed rate is reasonable.[19] Since it appears from the record below that Lisbon's "written decision" did not comport with our rules in this area, this issue also must be remanded for further proceedings consistent with this order.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, A-R Cable's appeal of Lisbon's local rate order is REMANDED, with the above instructions, to the Town of Lisbon, Maine (MA 0075) for further proceedings consistent with this order.

12. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by § 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[19] *Rate Order*, 8 FCC Rcd at 5723.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FCC 94-288

In the Matter of	)	
	)	
Amendment of Part 73,	)	FO Docket 91-301
Subpart G, of the Commission's	)	FO Docket 91-171
Rules Regarding the	)	
Emergency Broadcast System	)	

REPORT AND ORDER AND
FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: November 10, 1994 Released: December 9, 1994

Comments Due: February 22, 1995

Reply Comments Due: March 24, 1995

By the Commission:

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I. SUMMARY

1. By this action, we establish the Emergency Alert System (EAS), which will replace the existing Emergency Broadcast System (EBS). We require broadcast stations and cable systems to install and operate new equipment for national alerts while relaxing some requirements for noncommercial educational Class D FM stations and low power television stations. Satellite, Direct Broadcast Satellite (DBS), telephone and cellular carriers, and other service providers are encouraged to voluntarily participate. A standard protocol and new digital codes are adopted that will facilitate different technologies using the new system. Finally, procedures are streamlined so that more participants can work together effectively during emergencies.

2. In a Further Notice of Proposed Rule Making ("FNPRM") we seek comment on how services such as the Multipoint Distribution Service (MDS)[1], Satellite Master Antenna Television (SMATV), and Video Dial Tone should participate in the new EAS. We also seek further comment on whether we should waive our EAS requirements for a defined class of "small" cable systems.

II. BACKGROUND

3. In 1951 President Harry S Truman established CONELRAD (Control of Electromagnetic Radiation) as the first national alerting system. Under CONELRAD, AM radio stations were required to broadcast only on 640 or 1240 kHz during an emergency alert to the public so that enemy missiles could not use transmissions from broadcast stations as a guide for their targets.[2] By the early 1960's the development of missile guidance systems made the two channel limitation obsolete.

4. In 1963 President John F. Kennedy established the Emergency Broadcast System and allowed stations to transmit on their normal frequencies during an emergency. Technical requirements for EBS equipment were developed in the 1960's and included an audio/analog two-tone alerting signal. It was not until the mid-1970's, however, that the Commission amended its rules to replace the CONELRAD signalling technique with the existing EBS audio signal. In 1976, a Memorandum of Understanding (MOU) between the Federal Communications Commission (FCC or Commission), the Federal Emergency Management Agency

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[1] These frequencies when used to deliver video programming are referred to as "wireless cable" services. See 47 C.F.R. Part 21, Subpart K.

[2] See Executive Order 10312, Dec. 10, 1951. See also FO Docket 91-171, 6 FCC Rcd 4264 (1991).

(FEMA), and the National Oceanic and Atmospheric Administration's (NOAA) National Weather Service (NWS) endorsed the two-tone EBS audio signal for use in state and local emergencies. This MOU was updated in 1982 to reflect the reorganization of FEMA.[3]

5. Our authority to regulate emergency broadcasting emanates primarily from Sections 303(r) and 706(c) of the Communications Act, 47 U.S.C. §§ 303(r) and 706(c). Section 303(r) is a general grant of rulemaking authority to the Commission. Section 706 grants specific, communications-related powers to the President in time of war or national emergency. In such event, the President may, for example, take control of, or suspend or amend the rules and regulations applicable to, any or all stations within the Commission's jurisdiction. Our EBS rules are designed to enable the President to exercise these powers quickly and efficiently.

6. Our authority to regulate participation by cable systems in the emergency alerting process, on the other hand, stems primarily from Section 624(g) of the Communications Act, 47 U.S.C. § 544(g), see paras. 50-65, infra. That provision requires the Commission to ensure that cable viewers are afforded the same access to emergency communications as broadcast viewers and listeners. We also note that the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., aims to "make all facets of our society fully accessible to individuals with disabilities."[4] Our rules adopted herein comport with that goal as well.

A. The current EBS

7. The current EBS is composed of technical equipment and an operational structure which provides guidance to those broadcast stations and others who participate in EBS. It is a joint government-industry effort which responds to a Presidential requirement to address the entire nation on very short notice because of a grave national threat. It uses the facilities of the communications industry, including 13 radio and 5 television networks, 12 cable networks, the Associated Press, Reuters and United Press International wire services, and over 13,000 broadcast stations.[5]

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[3] See MOU dated June 28, 1976; revised April 21, 1982.

[4] Comments of the National Center for Law and Deafness, November 24, 1993, at 5.

[5] The Broadcast Station Protection Program (BSPP) is a program funded by the Federal Emergency Management Agency (FEMA) that enhances the operating capability of key EBS stations. The program provides these stations with emergency generators, remote

8. Technically, EBS is an analog transmission system in which broadcasters are required to have specified equipment and relies upon operator control. During an alert, EBS equipment transmits audio EBS messages after receipt of a two-tone attention signal, which activates the decoder/receiver at a broadcast radio or TV station. The EBS station operator must listen to the audio message coming out of the speaker (of the decoder/receiver) to determine the reason the EBS signal has been transmitted.[6] If the audio message was a test of the system, the test date and time are logged. If the message is for a national emergency, they must alert the public. If the message is for a state or local emergency, responding personnel have a number of options, including ignoring or rebroadcasting the message.

9. The Commission requires the use of EBS only in the event of a national emergency. State and local authorities, however, may request use of the EBS to provide early warning to communities about regional, state, county, and local emergencies. More than 20,000 activations of the EBS have been reported since 1975[7], and every state and territory has used it. State and Local Emergency Communications Committees (SECC and LECC)[8] are responsible for the development of plans which detail procedures for stations and officials to follow for activation of the EBS. Broadcast stations have voluntarily made increasing use of EBS since the system was allowed to be used for local emergencies.

10. The current EBS has several significant drawbacks. First, the equipment relies on the broadcaster who receives the initial alert to alert other broadcasters in a "daisy chain."[9]

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pickup units, electromagnetic pulse protection, and other facility add-ons in order to enhance the stations' ability to continue to operate in an emergency. There are over 600 broadcast stations in the BSPP.

[6] The two-tone Attention Signal generated by the encoder does not carry any intelligent information. It merely turns on or activates the decoder/receiver.

[7] The Commission does not require stations to report EBS activations. Our figures represent only those activations which have been voluntarily reported. We believe, based on informal conversations with licensees, that thousands of additional alerts have been issued.

[8] See Section V.B. in this Order.

[9] "Daisy chain" monitoring refers to the present day system where key stations relay EBS messages with the two-tone signal from one station to another.

The daisy chain is often unreliable, as stations are completely dependent on the station they monitor to activate the EBS system. If the key "upstream" station fails to activate, stations further down the chain are not alerted to the emergency and, therefore, cannot inform their audiences. There has been no monitoring of multiple sources for emergency alerts. In addition, operators must be trained in EBS activation procedures in order to send and receive emergency notifications.

11. Second, much EBS equipment dates back several decades. Very few manufacturers produce repair parts for EBS equipment. If a broadcaster had to purchase replacement EBS equipment, the replacement costs would be comparable to the cost for new digital equipment. Moreover, even if the current equipment could be economically maintained, cable participation in EBS would be severely handicapped because the present signalling scheme does not lend itself to unattended operation.[10]

12. Third, when an emergency strikes, the EBS can still fail even if the alert is forwarded to the next station in the chain, the equipment is working properly, and the operating personnel are knowledgeable because the current EBS relies on station personnel to acknowledge and relay the alert, which can cause critical delays. Seconds may mean the difference between life and death during sudden emergencies such as tornadoes, flash floods, hazardous chemical spills, and nuclear accidents. In addition, current EBS equipment does not allow participants to alert the public selectively in the event of an emergency. For example, an EBS alert warning of a flood may be of little value to listeners located in more distant locations. These disadvantages of the EBS have become more apparent as communications technology has advanced, and have contributed in part to our determination to examine more closely the modernization of the system. After every major disaster, the National Oceanic Atmospheric Administration (NOAA) conducts a survey to determine the effectiveness of warning systems. Approximately 80 percent of these surveys have indicated the need for improvements in the EBS because of deficiencies inherent in the old system.[11]

B. Origin of this proceeding

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[10] Cable system facilities are predominantly unattended, and headends are frequently located in remote areas. As noted above, the current EBS system depends on manual intervention by trained personnel to pass an alert to additional broadcast stations and to inform the public of an emergency.

[11] See letter from NOAA, NWS to FCC, May 20, 1994.

13. In 1989 the National Association of Broadcasters (NAB) petitioned the FCC for a rule making to shorten the two-tone audio alerting signal and to revise other operational aspects of the EBS.[12] In 1991, the Society of Cable Television Engineers (SCTE) established an EBS working group to explore the most efficient and cost effective manner to reach their cable subscribers during an EBS alert.

14. Since 1991 there have been four Commission actions examining the modernization of EBS. On June 13, 1991, we adopted a Notice of Inquiry (NOI)to solicit comments on new technology and equipment that would improve EBS.[13] On October 9, 1991, we adopted a NOI/Notice of Proposed Rule Making (NPRM) to solicit comments on the NAB petition to shorten the two-tone signal and to propose a rule to prohibit false use of the EBS signal.[14]

15. On September 17, 1992, we adopted a NPRM/Further Notice of Proposed Rule Making (NPRM/FNPRM), FO Dockets 91-301/91-171, consolidating the earlier proceedings and seeking further comments on proposals to update the technical and operational features of the EBS.[15] On November 12, 1992, we issued a Public Notice addressing a requirement in the Cable Act of 1992 to include cable in EBS and invited commenters to discuss this requirement when filing comments to the NPRM/FNPRM.[16] We received 63 comments and 17 reply comments in response to the consolidated NPRM/FNPRM.[17]

C. Field tests

16. In December, 1992, we invited equipment manufacturers to demonstrate their alerting equipment and prototypes at the

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[12] See Petition for Rule Making (RM-7188), filed by the National Association of Broadcasters.

[13] Notice of Inquiry, FO Docket 91-171, 6 FCC Rcd 4264 (1991).

[14] Notice of Inquiry/Notice of Proposed Rule Making, FO Docket 91-301, 6 FCC Rcd 6739 (1991).

[15] NPRM/FNPRM, FO Dockets 91-301/91-171, 7 FCC Rcd 6903 (1992).

[16] Public Notice, DA 92-1497, November 12, 1992.

[17] Commenters and reply commenters to the NPRM/FNPRM are listed in Appendices A and B.

Commission.[18] Eleven manufacturers participated. This demonstration showed that newer technologies were available and effective to create more advanced emergency communications equipment.

17. We determined that further testing would reveal the best methods to integrate various technologies, the compatibility of different prototype equipment, and verify the robustness of the proposed digital protocols. We invited interested parties to participate in field testing of the proposed EBS system.[19] An Eastern and a Western field test were scheduled. Plenary meetings for the tests began in March 1993. These meetings involved manufacturers, industry members, and government officials. Each test was headed by a state EBS coordinator who worked with the group to design the tests. The testing was based on the proposals presented in the NPRM/FNPRM and drew on the expertise and experience of each participant.[20] The field tests documented the capabilities of existing or prototype equipment to deliver emergency communications.[21]

18. The Western Field Test was conducted June 27 through June 30, 1993, in Denver.[22] More than 75 representatives from broadcast stations, cable systems, satellite companies, emergency management offices, consulting engineering firms, amateur radio organizations, and manufacturers of alerting equipment and consumer end products, voluntarily provided their own personnel and resources for the tests.

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[18] See Public Notice No. 30336, October 29, 1992, "FCC To Hold Exhibit of Various Emergency Alerting Systems."

[19] Public Notice No. 31623, February 3, 1993. More than 150 representatives and observers from broadcasting, cable, satellite, other communications transmission means, emergency management, equipment manufacturers, and government agencies participated in these tests.

[20] The various tests were meant to be exemplary and not inclusive of every proposal in the NPRM/FNPRM. See Appendix D for list of participants in the Western and Eastern field tests.

[21] More than 35 devices were demonstrated during the tests. While the tests were not representative of all aspects of our proposed system, they did indicate that the equipment tested had the capability of delivering alerting messages in many kinds of environments.

[22] See Public Notice, DA 93-1211, October 6, 1993, and the Western Field Test results referenced therein.

19. In-band, subcarrier, satellite, HF radio, VHF, UHF, microwave, and telephone were the primary transmission modes tested. Three focus groups and one composite focus group offered some insight into audience perception of the systems and equipment.[23]

20. The Eastern Field Test was conducted September 12, 1993, through September 15, 1993, in Baltimore.[24] The tests involved more than 60 representatives from government, industry, and manufacturing. Technical/emergency management personnel and others served as official observers to record the test results. Testing sites included the State Emergency Operation Center, experimentally licensed AM and FM stations,[25] FCC field facilities, the National Weather Service office, a cable head-end, existing AM and FM stations, and Spanish language television and radio stations.

21. The goals of both tests were to examine the ability of broadcast, cable, satellite, and other means to transmit digital information, to test speed, redundancy and reliability factors, to determine operator needs for equipment responsiveness, to test as many of the parameters in the NPRM/FNPRM in different situations as feasible, and to experiment with an architecture broad enough to encompass other technologies as they become available. In response to the field testing, we received 42 comments and 9 reply comments.[26]

22. The test data demonstrated that (1) monitoring of

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[23] See Dr. Dennis Mileti's report in the Western Field Tests, pp. 484-511. The general group consensus was that there was no objection to devices that turned receivers on and off in the event of a real emergency; that testing should not be overused; and that there was a place for devices that flashed or radiated light to draw attention to the source of information.

[24] See id., discussion on the Eastern Field Test results.

[25] These stations were specially licensed by the FCC to Mr. Morris Blum, Chair of the Maryland Emergency Communications Committee, so that tests could be conducted continuously on-the-air and not disrupt an existing station's operations or programming.

[26] See Public Notice DA 93-1211, October 6, 1993, which invited interested parties to review and comment on the results of the field tests. Commenters and reply comments are listed in Appendix C.

multiple sources of emergency information was successful in providing reliability and redundancy; (2) a small geographic area could be alerted without affecting other areas; (3) transmissions could be easily relayed from point-to-point via different transmission means; (4) equipment could automatically receive, store, and forward alerts and messages; (5) in-band and subcarrier transmissions could coexist;[27] (6) satellite and cable technology could interface with the EAS digital transmission scheme; (7) mobile reception of in-band and subcarrier were equally susceptible to multipath, distortion, shadowing, and other propagation anomalies; and (8) consumer radio receiver equipment could turn itself on from an "off" position in response to broadcasters' digital signals, such as Radio Broadcast Data System (RBDS) signals.

23. The field tests clearly showed that the current EBS was of limited utility compared to capabilities offered by the new generation of digital equipment. The tests also conclusively demonstrated that digital messaging for emergency alerting was feasible regardless of the transmission link or operating environment tested. The digital coding schemes used during the tests were more technically demanding than the EAS codes which we adopt by this Order.[28] We found that transmission media traditionally associated with analog modulation, like AM broadcasting, were suitable for carrying digital information. Furthermore, we realized the significant possibilities of alerting using digital communications technologies, such as those used by some subcarriers, pagers, computers and satellite systems.

24. The tests confirmed that many types of transmission systems could be links in the EAS network, because they all were capable of digital signalling and interfacing. The tests showed that there was a place in emergency alerting for each transmission system because the systems complemented each other in delivering alert messages. Thus, we found that every technology and service had advantages, and each could fill particular needs.

25. There has been significant growth and improvement in emergency communications prototype equipment since the December 1992 demonstration and the field testing. Emergency managers, deaf and hard-of-hearing persons, Spanish language participants, and blind persons have given important feedback to the

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[27] Subcarrier transmissions do not interfere with the main channel programming, and therefore information can be transmitted without interfering with regular programming.

[28] See Appendix E, § 11.31.

manufacturers.[29] Cable equipment suppliers have worked to optimize the video display for television. During the course of the two tests, over 35 equipment prototypes were used, which indicates that manufacturers will be able to offer a wide range of equipment to broadcast stations and cable systems. Our tests also showed that satellite equipment manufacturers could offer emergency communications for mobile uses and other configurations.

III. MODERNIZING EBS

26. During this proceeding the Commission has held regional workshops and numerous meetings with the telecommunications industry, manufacturers, state and local emergency officials and others to discuss the technical and operational aspects of modernizing EBS. More than 225 entities have filed comments since this proceeding began in 1991.

27. We examined more than 20 issues in the NPRM/FNPRM. The key issues include: (1) requiring cable to be a participant, (2) designing equipment that can interact with all technologies, (3) permitting automation, (4) reducing dependency on single station monitoring, (5) reducing on-air EBS testing, and (6) shortening the two-tone alerting signal. The decisions on these and other items are discussed below.

28. Is There A Need for An Emergency Broadcast System? A threshold question is whether the Commission should continue to require an EBS or similar alerting system. Since the early 1950's, the installation of alerting equipment has been mandatory in order to provide the President with the capability to transmit national emergency information to the general public.[30] This requirement has been reaffirmed by every Administration since President Truman. We are fortunate in not having had an emergency requiring use of that capability. The fact that we have not had to use EBS for a national alert, however, does not necessarily support a determination to abandon the concept of an emergency warning system. As discussed further below, we continue to believe that maintaining such capability is in the public interest. Indeed, based on the history of this proceeding and of the EBS generally, we believe that effective emergency warning systems can reduce life and property loss and that

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[29] See generally comments of Self Help for Hard of Hearing People, October 22, 1993 and of the American Council of the Blind of Maryland, November 11, 1993.

[30] Alerting equipment is most frequently used to provide federal, state and local government officials a means of communicating critical information to the public.

effectiveness and timeliness are clearly linked.[31]

29. One commenter has questioned the need to modernize or replace the EBS and has suggested instead that EBS may not be necessary if there is greater use and expansion of the National Weather Service (NWS) NOAA Weather Radio (NWR) network as a replacement.[32] The Federal Emergency Management Agency (FEMA) also maintains warning systems. The FEMA and NWS systems, including NWR, and EBS, complement each other to form a cohesive warning structure. Each system working alone cannot do the job. NOAA Weather Radio alone does not have the coverage capabilities to reach all of the nation's populace. FEMA's systems interface mainly with other government agencies, including state and local emergency organizations. The EAS needs to have the emergency information from the above agencies. Working together, the three agencies provide federal, state and local agencies with a means to alert the public to all orders of emergencies. Radio and television broadcast stations currently reach nearly every part of the country, often with several stations. There are radios and televisions in virtually every home and business. In order to receive NWR broadcasts, the consumer must buy a special radio. Penetration of NWR receivers into homes is not comparable to that of standard radios and televisions.[33] We therefore do not believe that the NWR is a realistic alternative.

30. Can the EBS be Improved or Must it be Replaced? The NPRM/FNPRM proposed to modernize the EBS by requiring replacement of the old equipment with equipment capable of interacting with multiple mass communications technologies. Our review of the existing EBS indicated that there are enough serious shortcomings to warrant its replacement by a new Emergency Alert System (EAS). Of those commenters addressing this issue, virtually all supported the need for changing EBS. The shortcomings of EBS

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[31] In the NPRM/FNPRM, we pointed out that the new equipment would contribute to reducing the time it takes to disseminate an emergency message, and therefore, new equipment could reasonably be expected to yield a disproportionately large gain to the public interest.

[32] See ex parte letter of the National Association of Broadcasters to Chairman, FCC, April 29, 1994, and the Press Release of the Department of Commerce, "New Hazardous Weather Warning System," March 31, 1994.

[33] As one of the three agencies responsible for EBS, NOAA NWS has participated in this proceeding and has supplied extensive information to the Commission. See, e.g., letter from Assistant Administrator for Weather Services, NOAA, to Chief, Field Operations Bureau, September 13, 1994.

most commonly identified in the comments were the age and inflexibility of current equipment and the fact that it does not work with new mass communication technologies such as cable. As commenters overwhelmingly agreed, the existing EBS mechanism is vulnerable to operator error and at times has failed to deliver timely information to the public.[34] It also appears that the cost of replacing existing EBS equipment would equal that of new EAS equipment with superior capabilities and lower operating costs.

31. The majority of commenters agreed that it was no longer cost effective to invest in the current equipment. This perspective was best expressed by a joint filing of several state broadcast associations which stated: "We recognize that the new EBS improvements will cost us some money, but our consensus is that EBS is broken and needs to be modernized."[35] Another system participant commented: "While we realize that the modernization might create some additional cost, we believe such cost could be minimized by utilizing equipment with modular or highly integrated construction."[36]

32. One state broadcasters' association stated, "The system selected must work in seconds, must work every time and should require little or no broadcast operator intervention."[37] Other commenters were particularly hopeful that new equipment might alleviate common problems. "[W]e routinely incur problems with poorly trained operators after hours, or operators not at their usual positions 'to take the call'."[38] We agree with these commenters that it is impractical to rely on the current EBS equipment and operating procedures or to attempt to upgrade them using the existing analog EBS technology. We further believe that replacement of existing EBS equipment with a new generation of digital EAS equipment better complies with our statutory mandate to provide adequate communications facilities that

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[34] See, e.g., comments of Delaware Department of Public Safety, November 17, 1992, at 1.

[35] See ex parte letter from the New Jersey Broadcasters Association, the Connecticut Broadcasters and the South Carolina Broadcasters Association to Chairman, FCC, December 3, 1993, at 1.

[36] Comments of Cap Cities/ABC Inc., January 15, 1993, at 8.

[37] Comments of South Carolina Broadcasters Association, January 8, 1993, at 1.

[38] Comments of State of Delaware, Department of Public Safety, November 17, 1992, at 1 .

enhance national defense.[39] Replacement of EBS will ultimately result in an alerting system that will function seamlessly with many sources of emergency communications. In view of the reasons discussed above, we will replace, rather than attempt to improve, the EBS.

33. We are confident that the new equipment will be a better overall value than the current equipment because it permits automated operation, is reliable, and should be usable for a longer period of time due to its digital nature.[40] We weighed the advantages of a new system versus the costs of repairing and upgrading the EBS system, and find that requiring new equipment is clearly preferable.

34. The new system will not be limited to a particular transmission system such as analog broadcasting. No one transmission system could, in isolation, sufficiently achieve our goals for EAS. We agree with the concerns of most commenters that to select one system to the exclusion of others would create problems of incompatibility. Although some commenters and participants in the field tests preferred a particular transmission system, such as RBDS, there was no clear consensus by commenters on a preferred transmission system. We believe that by not choosing or favoring one transmission mode over others, the resulting alerting system will offer the most flexibility to system participants and also be in the best interest of the public and system participants.

35. The extraordinary diversity of technologies available to be used in an alerting system suggests a need for an architecture that can accommodate all the proposed media distribution schemes. Therefore, as the foundation for the new EAS, and as discussed more fully below, we will adopt a mandatory standard digital protocol with a flexible architecture usable by

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[39] See 47 U.S.C. §§ 151 and 606. EBS is also authorized by a Presidential Statement of Requirements dated October 17, 1990 and is cited in the 1992 Cable Act as supporting the national defense and saving life and property. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 16(b).

[40] If the present two-tone system were updated and not replaced, it would still have to rely on a daisy chain of stations monitoring for alerts, and weekly on-air audible tests would still have to be conducted. A major criticism made by the commenters was that the weekly tests caused the public to "tune out" the EBS alert, which placed them in jeopardy in case of a real emergency. As previously discussed, the daisy chain was also viewed as unreliable.

many kinds of transmission media.

36. With such a standard, in-band broadcasting of alerts could be received today over any radio or television. Subcarriers could transmit unobtrusive text data and activate turned-off receivers.[41] Cable could give all subscribers alerts and special cable equipment could provide the deaf, hard-of-hearing, blind, and non-English speaking audiences distinctive visual and audio alerts. Satellite terminals could be used for remote field activations and could be used on disaster sites. Pagers could be used to alert persons in offices or who are travelling. In addition, such a standardized digital protocol is flexible enough for expansion and upgrading as new kinds and generations of transmission systems become available in the future.

37. Renaming the EBS. In the NPRM/FNPRM the Commission sought comments on the merits of renaming EBS to reflect the incorporation of other technologies and the modernization of the system.

38. Although only nine commenters responded to this proposal, they provided a litany of reasons why this is the time to rename the EBS. Comments such as EBS "[S]hould be renamed to denote a multi-source information network;"[42] "[C]hanging the name would also help the public to understand there is a new, technologically advanced system replacing the current two-tone system, which has come to have a negative image;"[43] and it represents a "clean new start to a highly improved system"[44] typified support for the name change. Only one respondent was against changing the name, on the grounds that the present name had recognizability.[45]

39. We believe it is in the public interest to rename the current system. This action best reflects the inclusion of other technologies in the system and should dispel any negative images

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[41] Once a universal in-band protocol is in use, consumer grade radios can be produced possessing this same capability.

[42] Comments of Society of Broadcast Engineers, Inc., January 15, 1993, at 5.

[43] Comments of Society of Cable Television Engineers, January 15, 1993, at 15.

[44] Comments of Nutmeg Broadcasting Company and Connecticut Broadcasters Association, January 22, 1993, at 2.

[45] See Comments of L.S. Parr, January 14, 1993, at 2.

associated with the current EBS. The new system will be called the Emergency Alert System (EAS). Because cable and other transmission capabilities will ultimately become an integral part of the new alerting system, the word "broadcast" in Emergency Broadcast System should be changed to inform the public that the new system, EAS, is not necessarily a broadcast-based service but ultimately an aggregation of many services working together. The name change should also provide the opportunity to promote public awareness of the new EAS.

A. Broadcast participants

40. Broadcast stations will continue to play a significant role in the new EAS. The following paragraphs discuss the general parameters for their participation. Specifically, all broadcast station licensees, including noncommercial educational Class D FM stations and low power TV stations, will be required to have EAS decoders. Broadcast station licensees (except noncommercial educational Class D FM stations and low power TV stations) additionally will be required to have equipment capable of encoding the EAS codes installed in the broadcast station programming chain, such as at the transmitter, studio or control locations. If manual interrupt will be relied upon, encoders will have to be located so that station staff can initiate the EAS code and Attention Signal transmission at normal duty locations. Where broadcast stations are co-owned and co-located[46] with a combined studio or control facility, only one set of EAS equipment will be required for the combined facility.

41. Television stations will be required to have the capability to transmit automatically a visual message that will include the originator, event, location, and valid time period of the message. If the message is a video crawl, it must be displayed at the top of the television screen or where it will not interfere with other video messages. We strongly encourage FM stations, especially those with key EAS designations[47] located in areas with many emergencies, to transmit the EAS codes on subcarriers, including 57 kHz using the RBDS standard. See paras. 43-49, below. We do not, however, require this technology.

42. We believe that it is essential for all segments of the population to be advised of the need to take protective action in the event of an emergency. The American Hispanic Owned Radio Association drew our attention to the fact that, "Federal and

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[46] e.g., an AM station and an FM station licensed to the same entity may be co-located.

[47] See Appendix E, § 11.18.

State Emergency Broadcast Systems primarily remain set up to only serve the English-speaking population . . . In the event of a disaster/emergency, non-English speaking persons would be deprived of vital information . . . there are approximately 350 Spanish language stations across the country, serving over 98% of the Spanish-speaking population."[48] To alleviate the concerns of non-English speaking program providers and to ensure that all audiences have the ability to take appropriate measures during an emergency, such stations or program providers may send the actual EAS alert in their primary language.[49] Stations not carrying the test script or activation in English should so state in their Local Emergency Communications Committee plans. See paras. 131-135, infra.

43. Radio Broadcast Data System (RBDS). In the NPRM/FNPRM we discussed the FM "box" and further proposed to require Radio Broadcast Data System[50] (RBDS) encoding equipment for all key FM EBS designated stations. RBDS is a defined protocol for data that is transmitted on the 57 kHz subcarrier of FM radio broadcast stations[51]. Under this standard, data is sent at 1200 baud by utilizing BPSK modulation techniques. Information is released in specialized groups of revolving but continually updated data. Each group is delimited by a header which indicates the type of information in the group, such as paging, traffic messages (for road signs), navigation (Global Positioning System), tuning and radio format information, and data text. One group is Emergency Warning System (EWS, group 9A) which is incorporated with the other groups of data upon demand by the broadcaster.

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[48] See ex parte Comments of the American Hispanic Owned Radio Association, April 5, 1993, at 2.

[49] This action was endorsed by several SECC's. They were concerned that Spanish broadcast stations within their area were forced to send the current EBS test and alert in English and wasting valuable time since their audiences were non-English speaking.

[50] Radio Data System (RDS) is the commonly referred to name of the United Stations Radio Broadcast Data System (RBDS) standard, which was produced by the RBDS subgroup of the National Radio Systems Committee, sponsored by the Electronic Industries Association and the National Association of Broadcasters. The voluntary standard reflects the input from broadcasters, receiver manufacturers, users and potential users of RDS services.

[51] For a full explanation of RBDS, refer to the established standard developed by the National Radio Systems Committee (NRSC) sponsored by the Electronics Industry Association (EIA).

44. The RBDS technology allows for frequency agility which permits receivers to search out and lock on to local emergency alert stations. It allows for switching from one program source to the emergency alert. Many have Liquid Crystal Displays for display of text messages. Consumer receivers equipped with RBDS can be turned on selectively and automatically from a standby state, much like personal pagers or continuous tone coded squelch system (CTCSS) radios so that anyone hearing them would receive the emergency audio message being broadcast. Increasing numbers of consumer electronic devices, such as car radios, are equipped to receive RBDS.

45. Several parties, including broadcasters and emergency/safety coordinators, who filed in response to the NPRM/FNPRM and the Public Notice embraced the use of RBDS technology because of its capacity to perform a plethora of services, including EAS alerts. The enhancements most often mentioned were individual customer alerting, turning on inactive receivers such as radios, cassette or compact disc players (with RBDS receivers built-in), push-button activation systems for public safety dispatchers, the ability to receive multiple sources of emergency alerts, and enhanced security systems.

46. RBDS representatives in meetings and field tests related to this Order demonstrated the significant role this technology can have in the EAS system both for participants and the public. One of the alerting systems discussed in the NPRM/FNPRM is a significant user of RBDS technology.[52]

47. Many commenters and FM stations during the field testing expressed a strong interest in the increased use of subcarrier technologies and the RBDS standard.[53] One manufacturer who participated in the field tests provided equipment that exceeded the capabilities of the EAS. This equipment had many enhanced features favored by state and local communities who are in high risk areas and who therefore have a need for equipment with greater flexibility.

48. Those opposing use of RBDS raised concerns that requiring subcarrier use might be burdensome and in some cases conflict with current subcarrier uses. Nonetheless, the ability to have a new generation of consumer products that could

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[52] NPRM/FNPRM at paras. 17-19. See also Comments of Sage Alerting Systems, Inc., January 15, 1993, at 8.

[53] South Carolina Broadcasters Association, Jefferson County Emergency Management, EBS Waco Operational Area, and the Connecticut State Emergency Communications Committee were among the supporters of RBDS technology.

immediately alert the public was enthusiastically endorsed by many commenters. As one county manager pointed out, "[N]o emergency alerting system will be meaningful if it cannot automatically turn on devices in people's homes, cars and public assembly areas during the day or night."[54]

49. Given the significant potential of RBDS, we encourage FM broadcast stations to provide emergency warnings via subcarrier using RBDS. Before, simultaneously, or after transmitting EAS messages in the main audio channel, RBDS equipped stations may transmit EAS messages on a subcarrier. See para. 99, infra. We encourage FM stations, especially those key to EAS operations, to transmit the EAS codes in the RBDS standard. RBDS devices can be easily integrated with EAS devices because both employ common RS-232 data connections and protocols.[55]

B. Cable participants

50. The Cable Act of 1992 required standards to ensure that cable systems provide emergency information to their subscribers. It stated "[E]ach cable operator shall comply with such standards as the Commission shall prescribe to ensure that viewers of video programming on cable systems are afforded the same emergency information as is afforded by the emergency broadcasting system pursuant to Commission regulations...."[56]

51. For several years, the cable industry and the Commission have been exploring ways to increase cable television participation in the EBS. In 1991 the Society of Cable Television Engineers (SCTE) established an EBS subcommittee to review equipment designs that would allow cable operators to participate in EBS. SCTE also strived to identify mechanisms that would strengthen cable's capacity to inform cable subscribers of emergencies. In addition to its work in subcommittee, SCTE actively participated in the FCC field tests of the proposed alerting system, and several SCTE members began

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[54] Comments of Middlesex County Emergency Management, February 10, 1993, at 2.

[55] RBDS is available on several hundred FM stations in the U.S., covering more than 70 percent of the population. See Appendix E, § 11.51 (e), for rules regarding integration of RBDS into EAS.

[56] See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 16(b). The Cable Act of 1992 imposed this requirement by adding subsection (g) to Section 624 of the Communications Act of 1934, 47 U.S.C. § 544(g).

serving as local chairs on the EBS emergency communications committees. The National Cable Television Association (NCTA) has also been investigating how to increase cable participation without creating excessive burdens on the cable operator.

52. In the NPRM/FNPRM we proposed to make cable an equal partner in EBS. Recognizing that many cable operators use remote control and automation in their facilities, we further proposed to take into consideration these characteristics in the new system.

53. Commenters were supportive of our proposal to include cable in the new system.[57] Opinions differed, however, on whether participation should be mandatory or voluntary.[58] Some commenters were concerned that existing alerting equipment required by local municipalities should not be made obsolete, but rather should be incorporated into any new system.[59]

54. Those who believed cable participation should be mandatory frequently noted that a substantial number of households subscribe to cable systems. One commenter pointed out that in New York State, "[C]able television is available to approximately 85 percent of all dwelling units. Over 60 percent of these dwelling units, some 3.7 million households, actually subscribe to cable television."[60] Commenters who felt that participation should be voluntary cited the expense and technical difficulties associated with cable involvement.[61] Some suggested weighing the amount of involvement against the proportional cost. Also, one commenter pointed out that cable systems with existing emergency alerting systems have achieved great success even though their efforts are voluntary.[62]

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[57] Thirteen comments and five reply comments addressed cable participation in the new EAS.

[58] See Comments of State of Ohio Adjutant General's Department, December 2, 1992, at 3 and South Carolina Division of Information Resource Management, January 13, 1993, at 5.

[59] See Comments of Cablevision Industries Corp., January 15, 1993 at 2.

[60] Comments of Telecommunications Division, New York State Commission on Cable Television, January 15, 1993, at 2.

[61] See Reply Comments of Kenneth Wright, February 16, 1993, at 2.

[62] See Comments of Time Warner, November 12, 1993, at 5.

55. NCTA noted that "[S]ome cable systems have already deployed emergency alerting equipment in their headends pursuant to local franchise requirements. The Commission should ensure that this embedded base of equipment is not rendered obsolete by developing an EBS device that bridges the existing equipment with the new equipment."[63]

56. National cable program suppliers such as Home Box Office, MTV, Cable News Network and The Weather Channel have been participants in the national EBS since the mid 1980's. Few local cable systems, however, have purchased the necessary equipment to participate in the EBS. A possible reason for not participating is that some systems have equipment, as part of franchise agreements, that allows local authorities to override programming with emergency information.[64] Subscribers to these systems can still miss EBS emergency information, because of lack of participation by the cable system. If a cable subscriber is watching one of the many channels carried by a cable system and an emergency activation of the EBS occurs, that subscriber will, in many cases, be unaware of the EBS alert and, therefore, of the need to take protective action. The cable television viewer would receive the alert only if that cable system were a part of the EBS or if the channel that the viewer was watching were a local television station delivering an EBS message.

57. We believe that cable is an invaluable link in the dissemination of information during emergencies. More than 60 percent of all American homes are wired for cable. The Cable Television Advertising and Marketing Society estimated in 1992 that by the year 2000 cable penetration would reach 78 percent. The Cable Act of 1992 requires that cable television systems must be capable of providing EAS alerts to their subscribers.[65] That requirement, affording cable subscribers the same ability as broadcast viewers to take action to protect life and property, serves the public interest.

58. We therefore require cable systems to maintain EAS equipment in accordance with the rules we adopt in this Order

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[63] Comments of NCTA, November 12, 1993, at 2.

[64] See Reply Comments of Kenneth Wright, February 16, 1993, at 2.

[65] We currently require all television stations to provide video information in the event of any emergency communications, including, but not limited to, EBS. EBS activation requires both audio and video interruption. See 47 C.F.R. § 73.1250. The Cable Act requires that cable viewers be afforded the same access to emergency information. See para. 6, supra.

(See Appendix E). For national emergencies, we are requiring compulsory retransmission of Presidential EAS messages. Cable systems must interrupt all channels and provide information to subscribers. Although not required, we also encourage EAS activation for state or local emergencies.

59. Cable systems must transmit the national EAS message codes, the attention signal, emergency message, and end of message (EOM) code to their subscribers. The attention signal can be produced from a storage device instead of a type-accepted encoder. The equipment must provide an audio message on all channels for those event codes selected by cable company personnel. Cable systems may elect not to interrupt EAS messages from broadcast stations upon written mutual agreement among all concerned.

60. During an EAS alert, cable systems must provide 1) an all channel audio message override; 2) momentary video interrupts of short duration on all channels; and 3) at least one video message override channel.[66] Cable operators must provide the EAS video message on the television screen. The message may be at any location on the screen so long as it is easily seen by the subscriber. It must not interfere with closed captioned information.

61. Hard of hearing and deaf individuals were involved in the meetings and field testing of the proposed equipment.[67] One commenter delineated the importance of including video warnings on cable systems as part of the new EAS: "[I]t is fully consistent with the Congressional mandate of the Americans with Disabilities Act to make all facets of our society fully accessible to individuals with disabilities...any oral emergency messages that are broadcast through broadcast radio, television, or other media, should be made available in text form."[68]

62. The hard-of-hearing and deaf communities rely heavily upon cable television for emergency information. Cable systems must therefore provide either audio and video EAS messages on all

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[66] Video interrupt refers to the displacement of the television picture with a black, blank or flashing screen for short periods. Audio override refers to the replacement of audio messages with emergency audio information, while video override refers to providing visual/text emergency messages.

[67] See Comments of Self Help for Hard of Hearing People (SHHH), October 22, 1993, at 5.

[68] Comments of the National Center for Law and Deafness, November 26, 1993, at 3-5.

channels or an equivalent alerting function on the entire system for deaf or hard-of-hearing persons. The requirement for equivalent messaging can be implemented by using independent set-top alerting devices which are turned on by EAS equipment at headends. These set-top devices can provide audio alerts, voice warnings, and visual text messages.[69] Other equipment such as strobe lights, bed-shakers, and light blinkers may also be used by cable systems to provide alerts. Cable operators may determine at what level it becomes more cost-effective to provide all video channel override than to provide these devices to hard-of-hearing or deaf subscribers, subject to Commission oversight on the reasonableness of this decision. (See n. 168, infra).

63. Dual Tone Multi-Frequency The Society of Cable Television Engineers (SCTE) reported that many cable systems have installed Dual Tone Multi-Frequency (DTMF) signalling equipment between the cable system and local officials for use in transmitting emergency information as part of the local franchise agreement. The SCTE recommended that DTMF decoding be incorporated in the new equipment since it is already used by many cable systems.[70]

64. In the NPRM/FNPRM we envisioned a device that would have allowed cable systems to monitor for DTMF alert signals from a touch-tone telephone.[71] In view of our decision to use a standard digital protocol to perform the EAS alerting function, we do not think it is possible to use DTMF as a means of alerting cable systems of an emergency. It is critical that cable be interoperable with other EAS delivery systems. We do not want to overlook the current usefulness of DTMF, however, or clash with existing emergency system capability. DTMF codes may be used if converted to the EAS code protocol, so that the new EAS equipment may receive the decoded DTMF messages.

65. The new EAS code protocol will be a national standard and should exceed the capabilities of DTMF. Local emergency managers will find the EAS equipment much more flexible than DTMF equipment. For example, they will be able to access EAS equipment at cable headends directly. The emergency messages in the EAS protocol will also be available to local broadcast stations and NWS offices for further dissemination.

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[69] Such devices were demonstrated during the field testing and are currently available. See generally para. 25, supra, and comments of Safety Alert Monitor, November 12, 1993.

[70] See SCTE comments, January 15, 1993 at 8.

[71] See NPRM/FNPRM, para. 52.

C. Voluntary participants in the new system

66. This Order mandates that broadcast and cable participate in national alerts. They may also use the equipment on a voluntary basis at the state and local level to disseminate emergency information to the public. Other communications service providers and other entities such as electric power utilities can also provide valuable service in an emergency alert system. Many, such as telephony, satellite, and microwave networks, have voluntarily participated in EBS. We encourage their continued participation in EAS and invite other communication systems and technologies to also voluntarily participate.[72] We discuss in this section several technologies that were actively involved in this proceeding and explain the rules governing voluntary participation.

Satellite Communications Systems

67. Satellite vendors in meetings and field testing demonstrated the potential advantages satellites offer to the EAS scheme, particularly in situations when broadcast and cable signals are not available. During the field testing, equipment manufacturers demonstrated to the Commission that EAS codes, in their full digital form, could be transmitted by satellite. The new EAS could, therefore, be fully interconnected to any inherently digital communications channel. There are many services that employ digital satellite technology and, therefore, can transmit the digital EAS codes.

68. During the field tests, Information Systems Laboratories (ISL) used mobile Ku-band uplink and downlink satellite terminals to demonstrate how isolated or distant receive points could be alerted. A single mobile uplink unit was used at a central location, simulating a command site. Downlink units consisting of a dish, receiver, and computer were placed at the stations and cable headends. Codes were sent from uplink to downlink via satellite. Because the satellite transmitters and receivers use standard data interfaces, the satellite was a transparent and seamless transmission medium between encoders and decoders. This type of system can be useful to local emergency

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[72] Entities who wish to voluntarily participate in the EAS must follow the same procedures as EAS participants and are required to comply with the FCC's EAS rules. They should contact their State Emergency Communications Committee (SECC) or the Commission for instructions on using the system.

operations centers or disaster command units.[73] Therefore, we encourage the voluntary participation of satellite in EAS.[74]

69. In July of 1982, the Commission authorized the Direct Broadcast Satellite (DBS) service to provide satellite delivery of programming directly to homes using small, relatively inexpensive receive stations.[75] Several parties have been granted orbital positions and channels, and some have become operational. DBS entities filed comments in this proceeding, participated in the field tests and expressed an interest in carrying EBS activations.[76] The digital EAS codes will be compatible with digital DBS technology. The Commission is interested in bringing emergency alerts to consumers receiving video and audio programming through DBS. Therefore, we encourage the voluntary participation of DBS in EAS.[77]

NOAA National Weather Service

70. NOAA Weather Radio (NWR) offers an important low-cost alerting capability. Weather related emergencies represent over 80 percent of the total number of EBS activations. These warnings are initiated by the National Weather Service and are dispatched over local NWR transmitters.[78] The NWR services are being upgraded to preface all forecasts and warnings from all transmitter sites with intelligent digital codes. These codes are created by a device called the Weather Radio Specific Area Message Encoder (WRSAME) that is part of the NWR programming equipment at the local NWR office.

71. In the new EAS system, any EAS decoder can directly monitor for and decode WRSAME codes. EAS participants can be immediately and reliably informed of weather related emergencies with the addition of any ordinary weather radio receiver and off-the-shelf connections to the EAS decoder. Monitoring NWR

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[73] See Public Notice, DA 93-1211 October 6, 1993, and the field test results referenced therein. ISL tests in Colorado and Maryland demonstrated different interfaces to show the versatility of satellite transmission schemes.

[74] See Appendix E, § 11.11 (c).

[75] 47 C.F.R. Part 100, Subpart A.

[76] Comments of United States Satellite Broadcasting Company, Inc., January 15, 1993, at 1.

[77] See Appendix E, § 11.11 (c)

[78] As of the release date of this document, WRSAME is operational on 16 NWR transmitters.

directly is extremely beneficial to alerting the public when time saved means lives saved, and we encourage such activity.[79]

Personal pagers

72. A recent development in personal pagers is the ability to provide warnings that imminent danger is present. Regardless of where they are within the service area, pagers have the capacity to isolate all subscribers in the affected area and allow them to receive an EAS alert. Subcarrier paging in the field tests proved to be a useful service to persons travelling or sitting in meetings.

Other technologies

73. Since the beginning of this rule making, various industries have contacted us regarding the role they have in alerting the public to injuries from man-made incidents. We believe that such industries have a viable role in participating in the new EAS. Therefore, this Order encourages other entities such as utility companies and nuclear industries, to provide emergency communications voluntarily pursuant to the laws in their states and areas. The guidelines in the EAS rules explain how such industries may contact their local emergency communications committee and thereby serve as a participating link in delivering EAS alerts to specific target audiences.[80]

74. This Order also permits the voluntary participation of Digital Audio Radio (DAR), High Definition Television (HDTV), and digital/interactive systems, which can use this protocol as they come on line. Telephone and cellular carriers may also voluntarily participate by providing communications links for EAS messages between emergency managers and broadcast stations and cable systems, particularly in areas where EAS monitoring is difficult. EAS alert capability can be incorporated in pagers and cellular telephones. The EAS protocol is adaptable to a wide range of technologies and will accommodate voluntary participation by those entities.

Consumer products

75. During meetings and field tests related to this Order, representatives from the consumer electronics industry demonstrated equipment that could receive emergency alerts. The products included TV sets and radios, car radios, pagers, smoke

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[79] For further information on NWR, see supra at para. 29.

[80] See n. 72, supra.

detectors, CD players, cassette players, strobe lights, and other devices capable of immediately notifying the public of emergencies. An important quality that these consumer products shared was the ability to be turned on and off automatically.[81]

76. The public will clearly benefit from devices that can turn on for alert purposes when danger threatens.[82] A wide range of enhanced emergency alerting equipment is in use now, and industry is working on future prototypes. We encourage the development of these consumer products which enhance the access of Americans to instantaneous public safety messages. We will work to provide industry incentives by reducing unnecessary regulatory burdens.

IV. TECHNICAL STRUCTURE OF THE NEW SYSTEM

77. The EAS consists of operational and technical elements. The operational elements are discussed in Part V of this Order. The technical elements consist of the mandatory protocol, equipment requirements, and transmission pathways. We will discuss each of these in the following paragraphs.

A. Mandatory protocol

78. Although we did not directly address the question of a protocol standard, we did propose universal parameters that would be required for all devices so that all AM, FM and TV broadcast stations and cable systems would have compatible equipment.[83] We also discussed the possible use of the NOAA WRSAME or the Radio Data System codes to trigger automatic alerts at broadcast stations and cable systems. We sought comments on the importance of parallel coding for a portion of the coding sequence to increase speed and reduce errors in activating EAS. We further

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[81] Commenters and participants in the field tests overwhelmingly supported the use of consumer products that could alert them even if they did not have a receiver turned on. The most important caveat was that it not be used too frequently or it would be ineffective, and the feature would be deactivated by the consumer.

[82] The Electronic Industries Association's Consumer Electronics Group has supplied consumer products that might carry EAS information for test participants and the Commission to examine. See Appendix D for a complete list of all consumer product companies that provided equipment and worked on prototype models during the course of this rule making. Their participation was generated by the December, 1992, Public Notice.

[83] See NPRM/FNPRM at para. 54.

sought comments on the desirability of an End of Message (EOM) code that would be able to return EAS participants to their regular programming automatically.[84] Commenters on this issue responded unanimously to the need for the Commission to chose a single, very specific, and highly defined interstation signalling code and protocol. One party stated, "[T]he Commission needs to select one, and only one, mandatory signalling method for a revamped Emergency Broadcast System. To allow multiple information delivery methods means that radio and TV stations with service areas straddling state boundaries might have to install two, and possibly three, EBS monitoring systems, to ensure that the more reliable web architecture envisioned for an improved Emergency Broadcast System is not lost."[85] Further, the field tests held in Denver and Baltimore clearly showed the value of EOM.[86] All field test participants pointed to the critical need to have an EOM code in order to return stations to their normal programming.[87]

79. We agree with the commenters and have adopted mandatory EAS codes and protocol that must be used to construct an EAS message.[88] The EAS message consists of a digital header, an attention signal, an audio or text message and an End Of Message (EOM) code.[89] The digital codes use audio frequency shift keying tones similar to the National Weather Radio WRSAME system.[90] The digital codes and protocol will be used to activate the EAS for

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[84] See NPRM/FNPRM at para. 71.

[85] Comments of Dane Ericksen, November 12, 1993, at 4.

[86] See Public Notice DA 93-1211, October 6, 1993, Eastern and Western tests.

[87] See Comments of Information Age Systems, Inc., January 15, 1993, at 4.

[88] The EAS code protocol uses a non-standard data rate and shift frequencies. The reason for use of non-standard digital signalling is to allow it to be claimed as an exclusive government emergency warning standard and thus control its use. Non-standard signalling should not increase the complexity of the equipment or components, but does mean that hardware must be designed specifically for this purpose. Thus, off-the-shelf devices cannot be used directly, making it more difficult for intruders to break into the system.

[89] See Appendix E, § 11.31, for a complete description of the EAS codes and protocol.

[90] See Appendix E, § 11.31. See also para. 70, supra.

national messages and state or local emergencies.[91] Because the codes are predefined, anyone receiving them can quickly determine their meaning. The codes define who originated the emergency message, the nature of the emergency, the location of the emergency, and the valid time period of the emergency. Also, the codes are within the audio bandpass of radio and television receivers and, therefore, are immediately available to the public. The codes have a unique transmission rate, which provides a measure of security because off-the-shelf equipment cannot be used to replicate the codes. This aids in identifying equipment that may have been used to transmit the codes illegally. Also, the code structure is very short and contains just three or four key elements. This enables EAS message originators to quickly develop warning messages for injection into the communications system.[92]

80. The location parameters can be for events affecting a whole state, a whole county, or a portion (down to 1/9th) of a county. If a city or area has its own Federal Information Processing System (FIPS) number, it can also be distinguished. An individual EAS message can contain 31 location codes. There can be unique codes for alerting specific locales such as schools, hospitals, neighborhoods, a single block within a neighborhood, or individual homes. All EAS messages will be Universal Coordinated Time (UTC) based time so that EAS messages originating in areas near the border of two different time zones and during time changes for Standard and Daylight time will be compared using the same base time standard. Additional emergency specific codes can be developed to interface with the EAS equipment. All codes will be cataloged by the FCC. The FCC and NWS will keep records of all of the codes in use. This will prevent the same Event code from being used for different emergencies and aid manufacturers and the public in programming their equipment.

81. The EAS header codes, attention signal, emergency program (audio or text) and EOM code must be transmitted in sequence in the main audio channel of all radio and television broadcast stations for EAS national emergency and required test

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[91] See Appendix E, § 11.31, for a full description of the EAS protocol.

[92] During the field tests, codes that contained the same structure as the new EAS signal were transmitted on the main carriers and subcarriers of broadcast stations; microwave links; telephone circuits; HF, VHF and UHF radio; and satellite systems. Propagation paths included nighttime AM skywave; multipath, co-channel interference, weak field strength conditions; and satellite transmission paths.

messages. Cable systems must transmit the EAS message in the same order and must provide a momentary video interrupt and an aural message on all channels and at least one visual message override channel.[93] For state and local emergencies, EAS participants are permitted to transmit the EAS message codes and the EOM code without the audio message in the main audio channel. The attention signal, which is what the public will hear, must precede any emergency audio message. Although the two-tone EBS attention signal will continue to activate the EBS system, after July 1, 1997, that signal will only be used to alert the public and not to activate the new EAS.

B. Prohibition of false and deceptive codes

82. In the NPRM/FNPRM the Commission proposed to add a new section to the Rules and Regulations which would prohibit false use of the EBS two-tone attention signal or any of the new special codes.

83. While this proposal did not generate significant discussion, all the commenters believed that there should be a prohibition against false use of the EAS. The Ohio Adjutant General's Department stated "strict rules should exist to prevent the misuse of the EBS signal."[94] Several commenters also stressed that any use of the EBS attention signal, other than for tests and activations, could be an enormous detriment to the system.

84. There are two prohibitions potentially relevant to misconduct in operation of the EAS: Section 325(a) of the Communications Act, which prohibits false distress signals, and Section 73.1217 of the Commission's Rules and Regulations prohibiting broadcast hoaxes. We believe a specific prohibition against the misuse of the EAS attention signal and codes is necessary, however, because it is more specific and directly addresses the proper use of EAS codes and tones. Therefore, we adopt new Section 11.45 to prohibit anyone from transmitting the EAS two-tone attention signal or any of the new special codes for false or deceptive use. Such false use and misconduct will be considered a false distress communication and will be subject to Commission penalties, such as monetary forfeiture or other appropriate sanctions.[95]

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[93] See Appendix E, § 11.51(g). See also para. 60, supra.

[94] Comments of State of Ohio Adjutant General's Department, December 2, 1992, at 2.

[95] See Sections 501 and 503 of the Communications Act. Broadcasters and cable systems may be liable for forfeitures as high as $250,000 for any single act or failure to act which

C. Equipment requirements

85. In the NPRM/FNPRM, we proposed to replace the equipment used in the EBS with three similar new devices: one would function with AM radio/TV, one with FM radio, and one with cable television. Each device would have specified input and output parameters to allow a broadcast station or cable system to disseminate emergency information.[96]

86. Commenters overwhelmingly supported replacing the EBS and recommended that there be a single device incorporating all the requirements for AM, FM, TV, and cable systems.[97] The requirements are, basically, a means to send an emergency alert and a means to receive it. We agree with the commenters that equipment designed to meet the technical requirements of the EAS should share certain universal characteristics. We also agree with commenters that these requirements can be met with a single device. We note, however, that certain broadcast stations will not be required to initiate EAS alerts and, thus, will not need a device which has both an EAS encoder and EAS decoder.[98]

87. We have adopted rules, therefore, to require EAS equipment to be capable of performing certain functions of the EAS rather than adopting rules requiring specific equipment. Simply put, all EAS equipment must be capable of using the EAS protocol either to send or to receive EAS alerts.

88. EAS equipment must be able to perform the functions described in Sections 11.31, 11.32, 11.33, 11.51 and 11.52 of Part 11. EAS equipment may be manufactured either as an integrated unit containing both the EAS encoder and decoder or as separate units. In either case, the equipment must be certified in accordance with Part 2 of the Commission's Rules, 47 C.F.R. Part 2.[99] Specific functional capabilities for EAS encoders and decoders are discussed below.

89. We believe that this will promote the innovative design of the EAS equipment by permitting manufacturers to decide how to

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constitutes a willful or repeated failure to comply with the Commission's Rules.

[96] See NPRM/FNPRM at para. 3.

[97] See comments of Sage Alerting Systems, Inc., January 15, 1994 at 26 and comments of TFT, Inc., January 15, 1993, at 1.

[98] See Appendix E, §§ 11.51 and 11.52.

[99] See Appendix E § 11.34.

configure equipment. This should also permit market forces to decide whether the functions of an EAS encoder or decoder will be put in one unit or separate units. A broadcast station, cable television system, or other EAS participant should be able to choose among equipment that meets its requirements.

90. EAS Encoder. An EAS encoder is used by EAS participants to originate EAS alerts by creating the EAS codes for transmission to other participants and the public. All EAS encoders[100] must have, among other requirements, the following capabilities: (1) automatic override for national (Presidential) EAS messages; (2) a means to select either automatic or manual operation to transmit EAS message codes; (3) at least one audio input and one audio output; (4) at least one data input and one data output; and (5) the ability to address specific geographic areas.[101]

91. EAS Decoder. An EAS decoder is used by participants to receive EAS alerts and to translate the EAS codes into an audio or video message. All EAS decoders must have, among other requirements, the following capabilities: (1) automatic override for national (Presidential) messages; (2) a means to decode EAS messages either automatically or manually; (3) audio inputs for two EAS monitoring assignments and one data input to receive another transmission mode, (4) a means to store at least two minutes of audio or text messages and at least 10 preselected message codes; (5) the ability to display any valid EAS message codes received to show the originator, event, location, valid time period of the message and the local time the message was transmitted; and (6) the capability selectively to receive originator, event, and location codes.[102]

92. Additionally, all EAS encoders and decoders must contain security measures to ensure that there will be no

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[100] Station and cable personnel use the encoder to originate their own EAS header codes and transmit the audio warning message. They can program the encoder to retransmit automatically the EAS codes and voice message whenever preselected emergency messages are received. Because the EAS codes are not an effective audio alert, stations need to send some form of audio alert, such as the two-tone alarm signal, to alert distracted viewers and listeners, and most especially for sight impaired persons.

[101] See Appendix E, §§ 11.32 and 11.51 for a complete description of the EAS encoder requirements.

[102] See Appendix E, §§ 11.33 and 11.52 for a complete description of the EAS decoder requirements.

unauthorized personnel changing preselected codes.[103] They must be installed so that if manual interrupt is selected, station or cable staff at normal duty locations will be alerted instantly upon the receipt of an emergency alert and can transmit EAS messages. Where broadcast stations or cable systems are co-owned and co-located (such as AM and FM stations licensed to the same entity at the same location or a cable headend serving more than one system) with a combined studio or control facility, only one set of EAS equipment is required for the combined facility.[104]

93. EAS decoders must be programmable so that licensees or operators can select certain message codes in advance. These preselected message codes will be automatically matched to incoming message codes. Message codes will be matched by selecting the originator (who), event (what) and location (where). Station or cable management will determine which message codes in their decoder will automatically interrupt their programming for emergencies affecting their audience. This includes setting priorities for state and local area emergencies. All decoders must be programmed for EAS national level emergencies and required tests.

94. The new digital EAS codes will allow system participants to relay EAS alerts to narrowly targeted audiences.[105] The new EAS decoder must have a display that will show who originated the message, the event or reason for the message, the location of the event, and the valid time period of the event in local time.

D. Two-tone alert signal

95. In the NPRM/FNPRM we proposed not to shorten the EBS two-tone signal[106] until the future of EBS became clearer in order to avoid stations having to buy potentially obsolescent

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[103] Unauthorized use of these or any other EAS codes is a serious offense and will be dealt with severely. See paras. 82-84, supra.

[104] See Appendix E, §§ 11.51 and 11.52.

[105] For state or local area emergencies, it is permissible for stations and cable systems to transmit only the EAS codes and end of message code. This will allow stations and cable systems to relay EAS emergency information with minimal disruption of programming for unaffected audiences.

[106] The shortening of the two-tone alert signal would permit EAS participants to reduce the signal to a minimum of eight seconds, and retain a 25 second maximum.

equipment.[107] Commenters agreed that the present two-tone signal was ineffective. They favored shortening it in the new system so listeners would no longer tune out the alert in the event of a real emergency.[108] In later ex parte filings, and as a result of the field testing in Baltimore, however, representatives of the blind community voiced strong opposition to a shortened tone. They argued that a shortened attention tone would not adequately draw a person's attention.[109]

96. The majority of commenters in this proceeding advocate shortening the two-tone attention signal because it is no longer perceived as an alerting mechanism, but as a precursor to an EBS test. We believe that the arguments advanced by commenters who advocate shortening the length of the two-tone signal are persuasive. We recognize the concerns of the blind community, however, who wish to retain the current length of the two-tone signal for emergency alerts. To ensure protection for the blind, the new tone was tested in several locations.[110] The piercing burst of short tones attracted the attention of both the blind and those involved in noisy activities such as listening to music. Therefore, we will allow EAS participants to shorten the two-tone attention signal to a minimum of 8 seconds beginning in 1995 or to use a signal of up to 25 seconds. Use of the existing two-tone attention signal to initiate emergency alerts will be phased out during the transition period permitted by this Order.[111] We permit the use of the shortened tone for the monthly on-air test so as not to desensitize audiences. We strongly encourage EAS participants to transmit a two-tone signal of 20 to 25 seconds in an actual emergency alert in order to attract the attention of all listeners, including members of the blind community.

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[107] See NPRM/FNPRM at para. 9.

[108] All 17 commenters who responded to NPRM/FNPRM on the issue of the two-tone signal supported shortening it.

[109] See ex parte comments of the American Council of the Blind of Maryland, December 15, 1993, at 2; Comments of the Maryland Advisory Council for Individuals with Disabilities, December 20, 1993, at 1.

[110] See ex parte filing of the American Council of the Blind of Maryland, April 25, 1994, at 1-2.

[111] Under the EAS, digital EAS codes are used to send and receive emergency alerts and the two-tone signal is used solely as an aural signal that emergency information is about to be sent.

E. Monitoring requirements

97. We proposed in the NPRM/FNPRM to incorporate multiple inputs into the new equipment to reduce dependency on any one station for alerting information and to reduce the problems inherent in daisy chain monitoring.[112] We further proposed that the equipment be capable of receiving emergency programming from two different sources and that other input ports be used for receiving and decoding signals from other transmission media, such as subcarrier signalling via the RBDS or the NWR WRSAME.

98. Commenters overwhelmingly supported multiple monitoring.[113] Group W supported the need to replace the daisy chain: "[R]eplace the unreliable daisy chain approach with the more effective multiple input approach to provide greater assurance that the public will be timely and accurately alerted during local, state and national alerts."[114] We agree with commenters' contention that multiple monitoring should eliminate problems of the existing EBS daisy chain by providing additional sources of emergency messages. We have adopted rules to require at least two audio inputs on the EAS decoder and at least one data input for optional EAS message code transmissions.[115] To ensure effective off-the-air monitoring, broadcast station licensees must continue use of two-tone signalling during the transition period.[116]

99. The monitoring assignments (key EAS sources) for participants are delineated in state and local area EAS plans. These plans are developed voluntarily by State Emergency Communications Committees. The FCC reviews these plans for conformance with the EAS rules. In situations where EAS

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[112] See NPRM/FNPRM at para. 58.

[113] See Comments of National Association of Broadcasters, January 15, 1993, at 2.

[114] Reply Comments of Westinghouse Broadcasting Company, Inc. Washington, D.C. February 16, 1993, at 3.

[115] Optional transmissions could, for example, be received from (1) RBDS via FM 57 kHz subcarrier; (2) WRSAME via NWR; (3) satellite; (4) HF radio; (5) the public switched telephone network; (6) the Weather Channel; or (7) other public service providers. See Appendix E, §§ 11.33 and 11.52 of Part 11.

[116] After July 1, 1996, all broadcast stations, and after July 1, 1997, all cable systems must install and operate equipment capable of receiving and decoding the EAS message codes, emergency programming and EOM code.

participants cannot reliably receive any of the key EAS sources in their EAS local area, alternate assignments can be obtained. Presently, broadcast stations are required to monitor only one source. After July 1, 1996, they will be required to monitor two sources. The Commission will entertain requests for waivers to change monitoring assignments for the two required sources (audio inputs). In situations where EAS participants cannot receive any of the recommended monitoring sources, alternate arrangements or a waiver can be obtained by written request to the FCC EAS office. In the event of an emergency, waivers will be granted by telephone with a followup letter to confirm temporary or permanent reassignments. Also, the FCC uses the data in the above plans to compile and maintain EAS state mapbooks and data bases. These mapbooks and data bases are sources of information for EAS participants, government agencies and the public. The FCC will provide this information through an electronic bulletin board.

F. Automation

100. The EBS system relies on having a person available at a broadcast station to activate the EBS when an EBS alert is received. Broadcast stations often are faced with the dilemma of what to do when the person responsible for activating EBS is away from the receiver/decoder or is inadequately trained in activation of the EBS equipment. The need to have a full-time person on duty to determine the content and nature of EBS messages is costly, time consuming, and is often ineffective when a sudden emergency occurs. This is particularly true in cable systems where automation is frequently used and no personnel are available. Additionally, under the EBS system, key stations alert other stations in their area. If there is a local emergency in only a portion of that area, audiences in areas unaffected by the emergency are needlessly alerted. This creates confusion and heightens nonresponsiveness in the event of an activation of the EBS because of an emergency.

101. The NPRM/FNPRM proposed to permit stations and cable systems to select the desired level of automation by designating the types of emergencies they wanted to transmit.[117] We further

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[117] See NPRM/FNPRM at paras. 17-26. We referred to three levels or "types" of automation that would free participants from having to monitor for EBS alerts: Type I automation, which would automatically override all programming of the station and alert the public immediately; (2) Type II automation, which would allow a short period of time for personnel to acknowledge and deactivate the system, and if the personnel responsible did nothing within several seconds, the system would automatically take over; and (3) Type III automation, which would always

proposed that certain categories of stations that were key to the EBS in sending alert messages to other stations could not elect full automation but sought comments on this proposal.[118] At the time, it was not known if they could reliably retransmit automatically digital codes through their audio processing equipment.

102. The majority of parties strongly supported the use of automation in the new system. Broadcasters stated that automation would ease the burden to always have a person on duty and reduce the chances of the station missing an alert that was critical to its audience.[119] Parties also regarded the use of remote control as a welcome enhancement that would increase the speed of delivering emergency communications to the public.[120] A significant point raised by commenters was that any ability to activate alerts from remote locations should have safeguards to avoid sabotage or misuse of the system.[121] Broadcasters and cable operators also wanted to be able to determine the circumstances under which they could use the automation features, including not using automation at all. The comments are best summarized by one commenter who stated: "[A]utomation of the new warning system should remove critical emergency decision making process from entertainment personnel or unqualified operators without abridging the broadcaster or cable operator's discretionary rights."[122]

103. We agree with the commenters' suggestions regarding the need to allow flexibility when using automatic operation and the need for protection against unauthorized operation. We believe our other proposals are not necessary as long as all types of automation are still permitted. We have, therefore, adopted rules requiring EAS encoders and decoders to provide both automatic and manual operation and will permit each EAS participant to determine whether to use automatic or manual

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require human intervention before it interrupted programming.

[118] See NPRM/FNPRM at para. 24.

[119] See Comments of National Public Radio, January 15, 1993, at 6; comments of the Society of Broadcast Engineers, January 15, 1993, at 7.

[120] See, e.g., Comments of KWFM, March 11, 1993, at 1.

[121] See, e.g., comments of the National Association of Broadcasters, January 15, 1993, at 13.

[122] Comments of David Fricker, Chair, Waco Operational Area, Waco, Texas, January 14, 1993, at 2.

operation to send or receive EAS alerts.[123] Additionally, in a companion item adopted concurrently with this Order, the Commission is proposing rules to permit the unattended operation of broadcast stations.[124] Unattended operation of a broadcast station requires automatic operation of EAS equipment. We are requiring manufacturers to provide protection such as a lock or other means to prevent unauthorized access to EAS encoders and decoders.[125]

104. Automatic operation may be used at the discretion of the broadcaster or cable operator. When in use, it must provide full interruption of programming and transmission of EAS messages.[126] Automatic interrupt must also cause the transmission of required tests and any preselected state and local area emergencies.[127] Automatic operation may be used when less experienced personnel are on duty, to preselect specific emergency alerts such as tornados or hurricanes. Automatic operation is required when facilities are unattended. We believe that allowing flexibility will allow EAS participants to tailor the use of automatic interrupt to specific situations.

105. Manual operation, the transmission of EAS alerts to the public by personnel on duty, requires the operator on duty to be alerted to the message, to read the message displayed on the decoder, and to decide whether to retransmit the message.[128] Although this procedure appears to be the same as the current EBS, there are important differences. EAS equipment will provide

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[123] Our proposal described three types of automation, Type I, Type II and Type III. See NPRM/FNPRM at para. 22. Because that terminology caused confusion and the comments, we are adopting a simpler terminology. Hereafter, any reference to automation means automatic interrupt(ion) for self-operating functions, and manual interrupt(ion) means functions necessitating human intervention.

[124] See Notice of Proposed Rulemaking in MM Docket 94-130, FCC 94-289, adopted November 10, 1994.

[125] See Appendix E, §§ 11.32(a)(1) and 11.33(a)(8).

[126] See Appendix E, §§ 11.51(k) and 11.52(e).

[127] EAS participants will program preselected Originator, Event and Location codes into the EAS decoder. When the decoder receives a transmission with the preselected codes it must provide the means to automatically interrupt programming. See Appendix E, § 11.51(k).

[128] See Appendix E, §§ 11.51(k) and 11.52(e).

a visual display of the alert. The operator will be able to determine the details quickly because the display must provide information about the nature of the emergency and the originator, among other things.[129] This will allow the operator to distinguish between tests and actual activations without waiting until the voice message begins, as is presently the case with the EBS.

106. EAS equipment can also be used when broadcast stations or cable systems are operated by remote control. If manual operation is used, an EAS decoder must be located at the remote control location and directly monitor the signals of the two assigned EAS sources. If direct monitoring of the assigned EAS sources is not possible at the remote location, automatic operation is required. If automatic operation is used, the remote control location may override the transmission of an EAS alert.[130] We strongly recommend that responsible personnel maintain strict internal procedures describing the hours of automation and the preselected codes for automation or when remote control is utilized.

G. Test requirements

107. We proposed in the NPRM/FNPRM to continue to require on-air weekly testing, but to permit EAS participants the opportunity to perform three of the weekly tests with no interruption of their regular programming.[131] We referred to this option as silent testing (we now refer to it as "unobtrusive testing" to reflect more clearly its true characteristics).[132] We further proposed to require a monthly "audible" on-air test that would be transmitted simultaneously by all stations/cable systems/other participants in a state or local area. We suggested that the tests occur between 8:30 A.M. and sunset, local time.

108. Parties that filed comments generally shared the view that "The weekly testing of the current EBS has relegated it to nothing more than a nuisance which radio broadcasters do reluctantly and the public disregards. By doing it unobtrusively, the integrity of EBS will be enhanced and its

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[129] See Appendix E, § 11.33(a)(4).

[130] See Appendix E, § 11.51(m).

[131] See NPRM/FNPRM at para. 54.

[132] The "silent" test is actually a sound (without voice or language), similar to static, unintelligible to the listener.

utilization increased."[133] Commenters also noted that on-air tests should not be limited just to daytime hours, noting that emergencies can happen at any time, not just between 9:00 A.M. and 5:00 P.M.[134] A few commenters supported the continuation of the weekly on-air audible testing as a means to familiarize their staffs on how to use EBS in the event of an emergency.[135] Another point raised by those who filed said that it may be extremely difficult to coordinate a monthly on-air test.[136]

109. Because the EAS equipment uses digital codes to transmit emergency alerts, the requirement that participants use audio messages when conducting weekly on-air tests is no longer necessary. We remain convinced, however, that it is important to fully check the emergency alerting capability of the EAS by conducting monthly on-air tests of the new equipment just as it would be used for an actual EAS emergency.

110. Therefore, we are adopting rules that will change the procedures for EAS tests.[137] All EAS participants will have the option to continue performing weekly tests with on-air messages or to perform three of the four weekly tests in an unobtrusive testing mode.[138] Unobtrusive testing should assure that the EAS equipment is functioning properly.[139]

111. Required monthly tests will involve, in addition to

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[133] Comments of Rhode and Schwarz, October 25, 1993, at 1 and comments of David Fricker, January 1, 1993, at 3.

[134] See Comments of Bill Croghan, Chair, Tucson, Arizona Operational Area, January 11, 1993, at 4.

[135] See Comments of the State of Ohio Adjutant General's Department, December 2, 1992 at 3.

[136] See Comments of William C. Glasser, Director of Engineering, WMBC, January 15, 1993, at 7.

[137] See Appendix E, § 11.61.

[138] Once the EAS equipment is operational on or before July 1, 1996 for broadcasters and July 1, 1997 for cable systems, the weekly test will consist of on-air transmission of only the EAS codes and EOM code. This should take about six seconds and be unintelligible to the listener. Because of the automatic capabilities of the new equipment, unobtrusive weekly tests can be transmitted at any time including early mornings or weekends.

[139] Participants can self-test by feeding encoder outputs into decoder inputs and thereby determine readiness.

transmission of the digital codes, the transmission of at least 8 seconds of the attention signal, test audio script and EOM code. All AM, FM, and TV stations and cable systems within the prescribed test area, as defined by the State Emergency Communications Committee (SECC), must transmit the test within the same 15 minute period[140]. This will fully test the system just as if it were being used for an EAS alert. Unattended broadcast stations and cable systems must have a record available that shows EAS test and alert transmissions. Tests in odd numbered months should occur between 8:30 a.m. and local sunset. Tests in even numbered months should occur at times other than between 8:30 a.m. and local sunset. They will originate from key EAS sources identified in the State plan. By varying the testing schedule, we ensure that all participants will become familiar with the new system and be able to successfully activate the system on a local or state basis.

112. The test schedule and test script content to be used for the monthly on-air test or any weekly on-air tests will be developed by the SECCs and the Local Emergency Communications Committees (LECCs) in cooperation with affected stations and cable systems, the National Weather Service, and emergency management officials. Test scripts for the monthly tests should describe EAS local involvement of participants and may include live messages from local officials. The SECC will approve the test script for monthly coordinated on-air tests. We will permit all non-English speaking stations and program providers to translate the monthly test script into the primary language of the station or cable channel, which will ensure that their audiences can quickly understand when a test is being conducted.

113. If a participant activates the EAS for an actual emergency at the local or state level, that participant is not required to conduct the weekly or monthly test that would otherwise have been required for that week. Activation of the EAS at the state or local level by a broadcast station or cable system must include transmission of an audio and video message to substitute for a monthly test. Stations or cable systems that were not operating during the hours that a weekly or monthly test was transmitted should determine when the test was performed and make appropriate entries in their records or logs.

114. If in the future the Chief, Compliance and Information Bureau, determines that monthly on-air testing is no longer

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[140] See paras. 131-135, infra, "State and Local Area Procedures," for a description of the role of State and Local Area Emergency Communications Committees (SECCs and LECCs).

necessary, the Chief, Compliance and Information Bureau[141] by delegated authority may waive or change this requirement. There will be no change (except name changes) to other tests of the EAS at this time. These include the periodic wire service tests, the weekly Emergency Action Notification (EAN) network tests, Closed Circuit Tests, and periodic National Primary source tests.[142]

H. Cost of an enhanced emergency system

115. In the NPRM/FNPRM we sought comments on the cost of the new equipment and any alternatives for modernizing the current equipment.[143] While few of the commenters, with the exception of manufacturers, were willing to speculate on the cost of the new equipment, twenty of the 63 commenters who filed in the proceeding stated that cost was an important concern.[144] Commenters were apprehensive that purchasing new equipment would be burdensome to small broadcast stations and small cable systems. Some suggested that if purchasing and maintaining equipment were to be mandatory, there should be subsidies to offset some of the costs; if no subsidies existed, participation should be voluntary.[145] Additionally, cable commenters suggested that because of the projected costs, it would be financially ruinous for small cable operators with fewer than 1,000 subscribers to participate in EBS.[146]

116. We recognize that there are initial costs associated with the new equipment, but believe the costs are justified.[147] If improved early warning contributed to only a small reduction

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[141] Formerly the Field Operations Bureau.

[142] See Appendix F for a definition of tests not requiring the full participation of EAS entities.

[143] See NPRM/FNPRM at paras. 46-49.

[144] See, e.g., Comments of Cablevision Industries Corp., January 15, 1993, at 3, Comments of National Public Radio, January 15, 1993, at 2, Comments of Cap Cities/ABC, Inc. January 15, 1993, at 8.

[145] See, e.g., Comments of SCTE, January 15, 1993, at 2, Comments of NCTA, January 15, 1993, at 5.

[146] See, e.g., comments of Kenneth Wright, January 15, 1993, at 3, Comments of SCTE, January 15, 1993, at 4.

[147] We estimate the total cost to the cable and broadcasting industries for the new EAS at approximately $165 million. See paras. 144 and 118, infra.

in injuries, lives lost, and property damaged, the benefits of the new EAS would still far exceed its costs. For example, a new EAS might have saved 10 percent of the 308 weather-related deaths in 1992, 10 percent of the 3,239 weather-related injuries and 1 percent of the $38.4 billion in property and damage.[148] If so, it would have meant that 31 lives could have been saved 324 injuries and $384 million in property damage could have been avoided.

Broadcasting

117. We are requiring broadcasters to purchase the new EAS equipment[149]. In addition, broadcasters will be able to use most of the peripheral connections that they now use with their existing EBS equipment. Estimates on the cost for new equipment vary depending on the sophistication of the unit. One manufacturer who participated in the field tests offered cost estimates based on prototype equipment for a medium range unit: If encoding and decoding equipment were purchased separately (instead of in one unit), a decoder would cost about $750, and an encoder would cost about $1,000.[150] Many manufacturers advised the Commission during the field tests that the most economical option would be to create a single unit encompassing both the encoder and decoder that will combine identical components and circuity into one chassis.[151] If such a common chassis were used, the cost of a single low-end unit would range from approximately $600 to $1,000. A medium-priced unit would cost from $1,500 to $2,500. Mass production may bring these costs even lower. Custom units would cost more. We expect that stations in low risk areas that have infrequent natural or man-made emergencies will choose less expensive models with fewer capabilities. Stations in higher risk areas will activate the EBS more frequently and are likely to choose costlier equipment with more sophisticated capabilities.

118. The entire cost of the new EAS equipment to the broadcast industry, approximately 14,000 broadcasters, could be as low as $8.7 million. This estimate could be reduced to the extent that stations are co-located because our new rules allow

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[148] See NOAA's 1992 Natural Hazards Statistics.

[149] See Appendix E, § 11.11(a).

[150] See Reply Comments of TFT Inc., November 12, 1993, at 1-4.

[151] See generally Field Test Results. We are giving manufacturers the option to build and broadcasters the option to purchase single unit equipment or separate decoder and encoder units.

one set of EAS equipment to be used to serve co-located stations.[152] In addition, as noted above, broadcasters will be able to use most of the peripheral connections that they now use, with their existing EBS equipment. Depending on the station's setup, installation costs could add an additional five to ten percent to the equipment costs.

119. Broadcasters' operating expenses for the new EAS will be lower than for the current EBS. The new equipment will not require trained operators, and remote automatic activation will be possible. Moreover, automatic audio and video messaging will be available, as will automatic logging. One commenter estimates, after a survey of small, medium and large stations, that the new system would provide a median annual operating savings of $5,280 per station.[153] Thus, operating savings alone may pay for all or most of a broadcaster's cost to install and operate the new EAS. We will therefore permit broadcasters to purchase the new equipment as soon as it becomes available.[154]

120. The two-tone EBS devices put in place during the late 1970's are nearing the end of their reliable lifetime. If a broadcaster had to purchase replacement EBS equipment, the replacement costs would be comparable to the cost for new digital equipment.[155]

121. Commenters and FM stations during the field testing expressed a strong interest in the use of subcarrier technologies and the RBDS standard.[156] FM broadcast stations may provide EAS emergency warnings via subcarrier using the RBDS standard before, during or after providing EAS messages on their main carrier. RBDS encoders are presently available for about $2,500 to

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[152] See Appendix E, §§ 11.51(j) and 11.52(c).

[153] See ex parte Comments of TFT, Inc., March 10, 1994, at 5.

[154] See Appendix G and Appendix E, § 11.11. See also paras. 164-170, infra.

[155] See Reply Comments of TFT, Inc., November 12, 1993, at 5 ("the 1976 two-tone EBS equipment, which averaged about $475, would cost (in today's dollars) over $1,200").

[156] See generally Comments of WBMX, December 28, 1992 and Comments of South Carolina Broadcasters Association, January 8, 1993.

$5,000[157] and offer services such as program identification, automatic tuning of receivers, and text messaging. For stations already equipped with RBDS encoders, the capability of sending emergency data is built in, and those stations would incur no further costs. RBDS equipment can transmit supplemental text messages and activate consumer receiving equipment.[158]

122. One manufacturer's system, for example, links, local government centers to RBDS equipped broadcast stations via dedicated Remote Pickup Unit (RPU) radios; the stations use RBDS subcarriers to contact other stations, cable operators, and the public on RBDS equipped receivers. The cost of such systems is about $2,000 to $3,000.[159] These FM stations monitor key state stations, the National Weather Radio, and local emergency operations centers via the RPU radios. AM, TV, and cable systems monitor, in turn, the key FM stations. The subcarrier RBDS data is unobtrusive since the consumer never hears the interstation signalling of the key FM stations. AM and TV broadcasters can then retransmit the data alert in-band using the EAS protocol.

123. The Commission has granted waivers of EBS requirements to broadcasters on a case-by-case basis.[160] We will continue to grant waivers of EAS requirements in appropriate circumstances upon sufficient showing of need. The request must be made in writing to the FCC's EAS office, Compliance and Information Bureau, Washington, D.C. 20554, and must contain at least the following: (1) justification for the waiver, with reference to the particular rule sections for which a waiver is sought; (2) information about the financial status of the entity, such as a balance sheet and income statement for the previous two years (audited, if available); (3) the number of other entities that serve the requesting entity's coverage area and that are expected to install new EAS equipment; and (4) the likelihood (such as proximity or frequency) of hazardous risks to the

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[157] See comments of Sage Alerting, Inc., November 10, 1993, at Exhibit 3.

[158] See Comments of RE America, January 14, 1993, at 2.

[159] See Comments of Sage Alerting, Inc., November 25, 1992, at 12.

[160] See EBS chronological files e.g. Northwestern College Radio Network, Dec. 21, 1994; Educational Media Foundation, Nov. 22, 1993; Moody Broadcasting Network, Oct. 20, 1994. See also 47 C.F.R. Section 0.231 (a). For example, waivers have been granted to allow one set of equipment for co-located stations, to not require the purchase of decoding equipment, and for certain operator requirements.

requesting entity's audience.

Cable systems

124. The cost to cable systems of complying with the new EAS technical requirements is higher than for broadcasters because of the multichannel nature of cable systems.[161] Although installation costs may vary, projected equipment costs for cable systems appear to be between $10,000 and $15,000.[162] Cable operators must purchase a unit that contains a decoder/encoder. This unit will provide the cable operator with the ability to receive and send EAS messages. As discussed above, the cost of the basic EAS decoder/encoder is estimated at $1,000.[163] In order for the cable operator to distribute the EAS message on its system, an override device is required. The estimated cost for a cable override device (including installation) is $10,700. This figure is based on a compilation of cable manufacturers' estimates for equipment used in the EBS field tests.[164] The device provides the capability to send an audio message on all of the channels of a cable system, a video interruption of all channels, and a video message on one channel. These two costs ($1,000 plus $10,700, for a total of $11,700) complete the equipment cost expenditure for the operator, and may be lower or higher ($10,000-$15,000) depending on the system and features selected. Co-located headends may use one set of EAS equipment, which would reduce this cost estimate.

125. In addition, cable systems must provide all channel video message override or a device offering an equivalent function for deaf or hard-of-hearing subscribers. Cable systems may provide all channel override rather than providing each deaf or hard-of-hearing subscriber with a special alerting device if

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[161] Costs vary dramatically, for example, depending on whether video or audio-only override of existing programming is required since the cost of video override is dramatically higher than audio override. Various commenters gave cost estimates for EAS equipment that varied widely depending on their assumptions regarding EAS requirements. See generally comments of NCTA and CATA, January 15, 1993; comments of Dynatech, March 15, 1993; comments of Albrit Technologies, November 12, 1993.

[162] See Public Notice DA 93-1211, October 6, 1993, Eastern and Western field test results.

[163] See para. 117, supra.

[164] See Public Notice, DA 94-420, April 28, 1994 (announcing meeting to discuss role of cable systems in light of proposed changes to the EBS.)

they find it more economical to do so. See paras. 61-62, supra.[165]

126. One manufacturer who participated in both field tests, HollyAnne Corporation, manufacturer of the Safety Alert Monitor, tested special alerting device and noted that "The reviews by Gallaudet University and SHHH both stressed that the [visual information] concept was one of their choices for methods to warn the deaf and hard-of-hearing with regard to the new EBS."[166] The control unit for the set-top that would provide alerting to the deaf and hard-of-hearing device would be located at the headend site and cost between $700 and $3,000 depending upon the level of features desired. A home unit currently sells for $40 for an audio device to about $60 for a device with a visual alert and message display.

127. We understand the concern of members of the cable industry when they point out they often carry upwards of 40 channels and are anxious that the costs not be burdensome. We therefore sought additional information from manufacturers and cable operators.[167] After reviewing all information, however, we conclude that it is technically and economically feasible for cable television systems to participate in EAS and that it would serve the public interest for them to do so. In order to allow them sufficient time to plan, we have also provided for phase-in of the EAS requirements for cable systems. It also appears that for purposes of cable rate regulation, the costs of complying with the new EAS rules should be accorded external cost treatment. We intend, however, to resolve the issue of external cost treatment for rate regulation purposes of costs incurred by cable operators in participating in EAS in a separate proceeding prior to the mandatory compliance date of the EAS rules for

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[165] With the concerns raised by the hard-of-hearing and deaf audiences and the fact that broadcasters face similar responsibilities to provide video emergency communications, we believe that cable systems must provide all audio and video messages to these special audiences. See, e.g., Americans with Disabilities Act, 42 U.S.C. § 12101. et seq. See also n. 168, infra.

[166] See Comments of Safety Alert Monitor, November 12, 1993, at 2.

[167] See Public Notice 42782, April 28, 1994, regarding a meeting to clarify filings made in the NPRM/FNPRM on methods to integrate cable into the EBS.

cable.[168]

V. OPERATIONAL ASPECTS OF THE NEW SYSTEM

128. This section of the Order explains how the current system will be streamlined and incorporated into the enhanced EAS operational structure. It will provide an overview of the many tasks which affect participants in EAS, including how to conduct the monthly tests, how the various emergency communications committees interact, and enhancements that will improve coordination among participants.

129. A common complaint about the current system was the terminology used to describe EBS designations and participants. The acronyms were complicated and confusing. Therefore, we are discarding the old EBS designations and creating more succinct terminology to more clearly define EAS functions. The new EAS designations are described in the new rules[169] and listed in Appendix F.

A. National procedures

130. We are, in this Order, revising emergency alert procedures at the national level to reflect the increased capabilities of the new EAS digital equipment. Presently, the Emergency Action Notification (EAN) network links the Federal government and 33 broadcast and cable networks and wire services. The Primary Entry Point (PEP) system includes 37 broadcast stations (now designated as National Primary (NP) EAS sources) as a backup to the EAN network. Under EAS, National Primary (NP)[170] stations will be able to disseminate national, regional, state or local emergency alerts and tests using the digital codes as a backup to the National Emergency Action Notification (EAN)

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[168] To better determine the actual cost or any additional specialized cost, such as for in-home equipment for the hearing impaired, or for additional character generators, the record in the instant proceeding may also be used by the Commission in the context of determining external cost treatment for cable operators. While our preliminary view is that the costs incurred by cable operators in participating in EAS should be accorded external cost treatment, the Commission would, of course, have the right to review the reasonableness of the cable operator's expenditures in this regard, such as the choice between providing all channel video override and providing individual warning devices to hard of hearing or deaf subscribers.

[169] See Appendix E, § 11.18.

[170] See Appendix F for Glossary of Terms.

network. The FCC and FEMA will study whether national level EAS messages can be digitally authenticated among the Federal government, the broadcast networks, cable programmers, and wire services, and their affiliates and subscribers. We intend to expand the EAN to include other technologies as they become viable in order to reach audiences not connected to cable systems.

B. State and local area procedures

131. The structure of the EBS system has been faulted as heavily as the equipment. A frequent lament of participants in the current system has been the unevenness of the effectiveness of the EBS from state to state and from one local operational area to another. EBS has been extremely successful in some states because of the dedication of the State Emergency Communications Committee (SECC) and the Local Emergency Communications Committee (LECC)in training new personnel, developing and updating SECC and LECC operating plans, holding coordinated tests, and ensuring that the plans are properly executed during emergency situations. These committees make technical and operational recommendations to state or local area authorities involved in emergency communications; serve as liaison with the FCC; and maintain liaison with appropriate industry committees at the national, state and local levels.

132. The SECCs will continue in their invaluable advisory and functional work. A SECC is organized in each of the 50 states, Guam, Puerto Rico, the Pacific Islands, the Virgin Islands, and the District of Columbia. We expect these committees to reorganize to include cable systems and other industry participants that can contribute to the dissemination of emergency communications. We expect the SECCs to hold elections for positions, to organize training, and to approve the policies and procedures for EAS operations, tests and activations within their domain. We anticipate that each SECC will have a Broadcast Co-Chair and Cable Co-Chair to ensure that their industries are fully participating in the development of state emergency plans. The Co-Chairs should chair each meeting of the SECC and should also ensure that the SECC membership list is kept current. The SECCs will develop and oversee state or local area monthly on-air testing of the system. Any local area without a plan, or that has not had a plan approved as a part of their state plan, must follow the test schedule and script for EAS procedures established by the SECC. Members of the SECC may also include the Chair and Vice-Chair of any LECCs that are formed within the State or Territory. All EAS participants are eligible to serve on their respective SECCs.

133. We anticipate that each state will organize meetings to determine whether their state or any local areas need to be reapportioned. For example, certain larger states, such as

California, may elect to divide into two committees, or some local areas may decide to combine.

134. State and local plans will become even more important under EAS because they will specify which alerts will be transmitted by key EAS sources in a State and local area. To provide stronger and more effective SECC plans, we strongly recommend that each emergency communications committee chair begin the development of an updated plan for distribution to all SECC participants and interested parties. This plan should provide for (1) improved mapbooks[171]; (2) reliable activations; (3) more effective monthly on-air testing; (4) adequate feedback mechanisms to the National Advisory Committee (NAC); and (5) better utilization of auxiliary entities (i.e., amateur radio, utility companies, nuclear plants).

135. All authorized sources for initiating EAS alerts should be approved and included in the state or local plan.[172] Franchising authorities seeking to use EAS for local alerts must participate in the state and/or local emergency communications committee and be included in the corresponding plan. This information will be vital to the stations and to the cable systems monitoring those sources. Plans developed by the SECC, or LECCs must be reviewed by the FCC prior to implementation to ensure that they are consistent with national plans, FCC regulations, and EAS operation.[173]

C. Advisory Committee

136. To assist in improving the effectiveness of EAS and to enhance the ability to provide advice, policy guidance and emergency communications coordination quickly to the FCC, we will revise the existing EBS Advisory Committee (EBSAC). The EBSAC has, through the years, provided the FCC with recommendations concerning emergency communications policy, plans and procedures. EBSAC consists of several hundred persons, however, making it very difficult to call meetings and respond quickly to issues. In accordance with the General Service Administration's Final

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[171] The FCC mapbooks contain stations and cable systems in a state, organized by their EAS local area and any special designations needed to identify their role in the system.

[172] As with the current system, local officials and in the case of cable, the designated franchising authority official, will have the ability to send emergency messages over the EAS with the recommendations and approval of the LECC, the SECC and the FCC.

[173] See Appendix E, Part 11.

Rule on Federal Advisory Committee Management[174], we intend to amend the EBSAC's charter membership. The EBSAC will be renamed the National Advisory Committee (NAC). The initial charter for the NAC will be for two years and will be subject to renewal.[175]

137. The NAC will provide coordination and critical direction in the implementation of the new rules and regulations for the EAS. It will advise the Commission on all matters concerning the EAS including, but not limited to, policies, technology utilization, procedures, training, education, and interface with the public and various industries wishing to be a part of the EAS. The new membership of the NAC will be composed of a small body of volunteer government and industry personnel selected by the FCC. It will include government officials involved in emergency communications, representatives of special audiences, and State Emergency Communications Committee (SECC) members. It will recommend the new guidelines for the operational functions of the EAS. Its new functions will include, but not be limited to, studying and submitting recommendations for emergency communications policies, plans, systems and procedures for all FCC licensed and regulated industries in order to provide continued emergency communications services under conditions of crisis or national emergency. NAC will also assist the Commission in educating the cable industry and other new participants on EAS.

138. Officers of the NAC will be elected for two year terms and will include representatives from the broadcasting, cable, and satellite industries, as well as other voluntary participants. All members of Commission advisory committees are volunteers. They are not reimbursed for attending meetings and travel at their own expense.

D. FEMA/NWS/FCC/industry coordination

139. With changes occurring rapidly in the field of emergency communications, it is necessary to strengthen coordination between the entities that are responsible for executing provisions of the EAS. The FCC will continue to work with the Federal Emergency Management Agency, the National Weather Service, and industry to enhance the new EAS. To this end, the Memorandum of Understanding (MOU) between the FCC, FEMA, NWS, and the old EBSAC will be updated by the respective parties.

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[174] 41 C.F.R. §§ 101-106.

[175] Federal Advisory Committee Act, 5 U.S.C. App. 2.

Primary Entry Point (PEP) stations[176] will be a component of the EAS, and the PEP Advisory Committee will be included in the revised MOU.

140. We intend that a coordinated FCC, FEMA and NOAA education and training program will be developed to teach emergency managers and other public service providers how to use the new EAS effectively to save lives and property. Additionally, the agencies will work together to reexamine the Broadcast Station Protection Program[177] and the revision of all state and local plans.

E. Instructional services

141. We have identified several areas that can immediately benefit from training and education initiatives. Some excellent suggestions were filed by commenters on training for EAS participants. The Society of Broadcast Engineers suggested that the FCC create more positive initiatives to integrate emergency communications information into the routine functions at broadcast stations.[178] The Westinghouse Broadcasting Company said: "The new EBS structure might also be taught in our public schools as part of a safety and first aid curriculum."[179]

142. EAS Operating Handbook. To avoid confusion with the many current forms used by the EBS staff, we will update our informational materials to enhance the effectiveness of the new EAS. The EBS Checklist will be replaced with the EAS Operating Handbook. The Handbook will contain in summary form the actions required of broadcast stations, cable systems, and other participating entities upon receipt of emergency notifications, terminations, tests, and state and local alerts. It will also contain monitoring guidelines and examples of EAS codes. A copy of the Handbook must be located at normal duty locations and be immediately available to staff responsible for authenticating messages and initiating actions.

143. Mapbooks. The FCC mapbooks list locations of stations

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[176] The PEP are the key broadcast stations throughout the U.S. which together can provide national emergency information in the event that the primary national alerting methods are inoperable.

[177] See Appendix F for Glossary of Terms.

[178] See Comments of the Society of Broadcast Engineers, SBE FCC Liaison Committee, January 15, 1994, at 10.

[179] Comments of Group W, January 15, 1993, at 18.

and cable systems in a state, organized by their EAS local area and any special designations needed to identify their role in the system. The mapbooks are developed by the Commission based on the state and local area plans. They are distributed to all broadcast stations, to all cable systems, and to other parties who are interested in participating in EAS.

144. Video and Audio Training Aids. As a result of the field tests we held, potential users of the EAS said instructions on how to use the new equipment would be necessary. Because the new EAS will have a potential 30,000 participants, we have decided to require all manufacturers, when delivering EAS equipment to broadcast stations and cable systems, to include an instruction manual and video tape on how to install, operate and program EAS equipment.[180] We also plan to produce a videotape which will walk participants through the operations of EAS from test to activation.

145. Use of Public Service Announcements (PSAs) and Commercial Sponsorships. In the NPRM/FNPRM the Commission sought comments on permitting the use of PSAs to heighten awareness of the new system and to permit commercial sponsorship of EBS tests to foster goodwill. Several commenters offered suggestions on how these announcements could be integrated into a public awareness effort, including the use of infomercials. There was some concern that any PSAs or commercials clearly not be a part of the test or activation. One commenter suggested that in order to avoid confusing the public or extending the stations' tests, any PSAs or commercials should also not use the new tone or codes.

146. To assist efforts to promote the new EAS, we will permit the use of PSAs or commercial sponsorship for announcements or infomercials explaining EAS to the public. Such announcements may be run at any time, but cannot be a part of the actual test or activation, and may not simulate or attempt to copy alert tones. If the announcement is run near the time of a test, it must be done before the EAS digital header code or after transmitting the EOM code.

VI. FURTHER NOTICE OF PROPOSED RULE MAKING

A. Further issues regarding cable systems

147. While the Commission has determined that cable participation is mandatory, there are related subsidiary issues that we believe require more extensive information. In this section, we seek further comment on a number of proposals

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[180] See Section 11.34 of the new rules.

regarding cable, MDS, SMATV, and Video Dial Tone (VDT).

148. Small cable system considerations. NCTA in their filings has continued to request that small systems be excluded and that there be a phase-in period for larger systems.[181] We realize that the cable industry is undergoing dramatic change and that cost of participating in the EAS must be planned and budgeted. Furthermore, because the cable industry may need more time to examine the best way to integrate EAS equipment into the headend, and because cable is being required for the first time to participate, we are allowing all cable systems an additional year for required equipment purchases beyond what is required of broadcasters.[182]

149. After examining the comments and data compiled thus far in this proceeding, we find that we would like more information to evaluate and balance the competing interests regarding the participation of "small" cable systems. Therefore, we have determined that the best course of action is to seek further comment on whether the obligations imposed by this order on cable systems generally should be waived or modified for some systems, in particular, for "small" systems or, whether an exemption should apply to those systems.

150. As discussed earlier at para. 123, there are waiver standards for broadcast participation in EBS and in the new EAS. The waiver process allows broadcasters to seek relief from certain requirements on a case-by-case basis. Therefore, we believe it is fitting to also seek comment on whether a similar waiver policy or a broader exemption would be equally appropriate for cable systems. Section 624(g) of the Communications Act requires the Commission to prescribe standards "to ensure that viewers of video programming on cable systems are afforded the same emergency information as is afforded by the emergency broadcasting system pursuant to Commission regulations...." We ask for comment on whether an exemption or special waiver policy for small cable systems is consistent with this mandate in light of the fact that we now provide waivers for broadcast stations.

151. We seek comments on the size standard that the Commission should adopt in defining small systems. In particular, we seek comments on whether we should adopt the Small

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[181] Comments of NCTA, November 12, 1993, at 3-4.

[182] See paras. 169-170, infra.

Business Administration[183] definition of small cable systems. That standard defines small businesses as those with annual gross revenues of less than $11 million. Alternatively, should the definition be based on some other figure for gross revenue, some other criterion such as number of subscribers, or some other combination of these criteria? For example, should we define small cable systems based on the number of subscribers, such as 5,000 or fewer, or even 1,000 or fewer? To assist us in our determination, we seek comments on the costs and benefits of cable participation in EAS associated with the size standards proposed herein, or any other size standard described by the commenters. In this regard, we seek comment on whether the Commission should exempt all cable systems meeting certain size criteria or whether we should proceed by waiver on a case-by-case basis taking into consideration size of the system as one of several factors. We also seek comment as to other factors that would be relevant to a waiver determination.

152. Second, we seek comments on whether availability to small cable system subscribers of alternative sources of emergency information should be a factor relevant to the determination to waive or exempt participation by any cable system. If so, how should that factor be measured and weighed in the decision? In this connection, we also seek comments on whether there are other circumstances that would weigh in favor of or against affording exemptions to small cable systems. For example, should a small cable system be exempt from EAS participation in an area where there are no other radio or television stations?

153. Potential preemption of state and local standards. The rules we adopt today serve only as a floor for cable systems' participation in the EAS. Our EAS rules only require national emergency announcements. Over 4,000 cable systems, however, have local emergency announcement requirements in their franchises. Many local jurisdictions, such as those near nuclear power plants or on flood plains, may have special emergency alerting needs. We encourage local officials to permit cable operators to remove equipment installed under local franchising agreements and convert to EAS equipment. We seek further comment as to whether the existence of conflicting requirements imposed by local franchising authorities poses any threat to the federal objective

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[183] Under the Small Business Act, the Commission is required to use small business definitions created by the Small Business Administration (SBA) with regard to any regulation applicable to small businesses, unless other statutory definitions are applicable. In the alternative, the Commission may adopt small business size standards different than those developed by the SBA, subject to SBA approval.

of maintaining EAS nationwide alerting capability and, if so, whether we should preempt application of these conflicting requirements.

B. Services under further consideration

154. In this Order, we have identified broadcasting and cable as mandatory participants in EAS. We have encouraged the voluntary participation of satellite, DBS, telephone and cellular carriers, public service providers and other services such as Digital Audio Radio and HDTV as they come on line. In this section, we seek further comments on whether additional services should be required to participate or whether their participation should be voluntary.

155. In the NPRM/FNPRM, the Commission sought comments on including services such as Multipoint Distribution Service (MDS)[184], Satellite Master Antenna Television Systems (SMATV) and others in the new EAS.

156. Commenters who addressed these proposals supported allowing all services to participate in the EAS. The majority pointed to the proliferation and speed with which new services are being developed and the need for a framework that can accommodate this growth. This concern was exemplified by one commenter who stated "We must replace the old system with a new system that is not only technically advanced today, but will be advanced and expansive after the turn of the century."[185] Several entities in the satellite industry filed comments supporting the inclusion of satellite technology and DBS in any new system.[186] The National Cable Television Association (NCTA) and the Community Antenna Television Association (CATA) voiced

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[184] Multipoint Distribution Service (MDS) includes frequencies allocated for Multichannel Multipoint Distribution Service (MMDS). In this Order MDS will be used to refer collectively to single channel and multiple channel MDS. In addition, applicants may lease Instructional Television Fixed Service (ITFS) frequencies on a part-time basis for MDS use. Also applicants may apply for vacant ITFS channels for commercial purposes, subject to certain restrictions. Collectively, these frequencies when used to deliver video programming are referred to as "wireless cable" services. See 47 C.F.R. Part 21 Subpart K.

[185] Comments of the EBS WACO Operational Area, February 16, 1993, at 3.

[186] See Comments of United States Satellite Broadcasting Company, Inc., January 15, 1993, at 2.

their support for "incorporating new technical advances and promoting interoperability with all technologies including broadband cable, fiber optics and satellites."[187]

157. We agree with commenters that it is important to include all services that are interested in and capable of providing emergency communications to the public.[188] We recognize that different services and technologies offer unique alerting techniques. To incorporate the benefits of varied services and technologies, we have designed the EAS equipment to use a digital signalling protocol that is usable by all services. We seek comments on whether the specific services discussed below should be required to participate.

Multipoint Distribution Service (MDS)

158. MDS, or "wireless cable," is a service that delivers information and programming to a preselected audience within a community. A local MDS station transmits programming over the air on microwave frequencies to a special receiving antenna located on the subscriber's roof. This antenna takes the microwave signals and feeds them into a converter that puts the information on VHF channels of conventional televisions sets.

159. We propose that MDS system operators be required to have EAS decoders. This will ensure that they will be able to receive alerts and transmit them to their subscribers, either automatically or manually. We propose that they not be required to have EAS encoders but encourage[189] them to do so.[190] During an alert, we propose that MDS systems provide: (1) an all channel audio message override; 2) momentary video interrupt of short durations on all channels; 3) at least one video message override channel; and 4) either all channel override or an alternative means of providing alerting information to hearing impaired or deaf subscribers.

160. Participation by MDS service providers in EAS would be required for both exclusive and leased channels (i.e., at times

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[187] See comments of NCTA and CATA, January 15, 1993, at 1.

[188] See III.C. "Voluntary Participants in the New System," supra.

[189] See para. 59, supra.

[190] MDS system operators do not have to purchase encoders because there will not be other stations or cable systems monitoring them for EAS. MDS stations, however, will retransmit EAS messages.

an ITFS channel is used for MDS). The level of participation would be equivalent to the standards that will be required of cable systems. Although this requirement would not apply to ITFS licensees, the Commission is interested in carriage of EAS alerts and warnings by MDS operators regardless of the frequencies used. We seek further comment on the appropriate role for MDS providers in EAS, how MDS participation should be structured, and on the costs and benefits of MDS participation in EAS. We also seek comment on whether any MDS systems should be exempted. In concordance with the issues that we raised concerning exemptions for small cable systems, see paras. 148-152, supra, we seek comments on the factors that should be taken into consideration in exempting any MDS systems. Finally, we seek comment on the timetable for MDS participation if mandatory participation is ordered.

Satellite Master Antenna TV (SMATV)

161. In earlier Commission action[191] the National Private Cable Association claimed a potential market of 17 to 22 million SMATV subscribers and noted the valuable service they provided to customers. As discussed elsewhere, it is important to the safety of life and property for all service providers with a substantial audience or subscriber base to participate in the EAS. We seek further comments on whether participation in EAS by SMATV should be mandatory or voluntary, and on the costs and benefits of their participation in EAS. We also seek further comments on the timetable for SMATV participation if we determine that its participation should be mandatory.

162. Although the rules in Part 11 do not require SMATV systems to participate in EAS[192], they are encouraged to do so. If they elect to participate, they are expected to follow the same guidelines and rules which are laid out for cable service providers. For those SMATV entities, as well as smaller cable systems and MDS providers, that elect at this time to voluntarily provide EAS to their customers, they are encouraged to follow the same implementation timetable as cable.

Video Dial Tone

163. We recently finalized our policies establishing the regulatory framework for telephone companies to deliver video programming on a common carrier basis and to engage in certain

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[191] See FCC Report to Congress on Cable Television, 5 FCC Rcd 4962 (1990).

[192] See Appendix E, §§ 11.11, 11.51 (h).

other unregulated activities.[193] We anticipate that telephone companies will begin the commercial provision of such "video dial tone" in the relatively near future. We solicit comment on whether provision of such services should be subject to EAS requirements, and if so, whether they should be the same as, similar to, or different from those we are mandating for cable systems. Parties should comment on the question of whether participation in EAS may constitute the provision of video programming and whether the obligation to participate in EAS should be imposed on the common carrier video dialtone service provider or the programmer customer. Parties should address the similarities or differences between video dialtone service and cable service in discussing application of EAS requirements to video dialtone.

VII. IMPLEMENTATION TIMETABLE

164. There was some discussion in the comments regarding whether existing emergency systems in broadcast and cable facilities, some with very advanced technology, must be replaced with the proposed new equipment. Those commenters suggested that flexibility should be afforded to systems that have existing equipment so they might implement the new scheme with existing equipment, and possibly phase out existing equipment over a number of years. One commenter suggested that "[T]he system should be able to be accomplished at reasonable cost and that the program as it applies to cable systems not render obsolete existing warning equipment which many operators have already installed."[194]

165. Various commenters have stated the need for adequate time to install new equipment: The Community Broadcasters Association noted "[I]mprovement must be balanced against allowing enough time for the equipment market place to become reasonably competitive."[195] In order to achieve the maximum benefit from the new EAS, all EAS participants must have equipment that is compatible with a common digital alerting protocol.

166. We have developed a timetable to phase out existing

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[193] See Telephone Company-Cable Television Cross-Ownership Rules, FCC 94-269, released November 7, 1994 ("Video Dial Tone Order.")

[194] Comments of Cablevision Industries Corp., January 15, 1993, at 2.

[195] Comments of the Community Broadcasters Association, January 15, 1993 at 4.

equipment and to phase in the new digital EAS equipment. The time allotted reflects our assessment, based on the record in this proceeding, of the lead time needed by industry to develop, produce, and install new equipment balanced against the public interest in rapid implementation of the new EAS. Broadcasters, cable operators, engineers, utility companies and others frequently inform us they are seeking estimates to budget new equipment, request waivers of the requirement to repair broken EBS equipment, and inquire into the status of this rule making, which might require them to upgrade their facilities. Therefore, pursuant to provisions outlined in this Order, all EAS participants, regardless of service, are required to purchase prescribed equipment subject to any waiver or exemption policy.[196] All participants may take advantage of the phase-in periods in order to budget for the purchase the new equipment.

167. Broadcasters. Broadcasters have long been the backbone of the EBS. We want them to be able to implement the new EAS quickly to realize the cost and operational advantages of the new system. Therefore, we are requiring that broadcasters replace EBS equipment with EAS equipment according to the following timetable: from the date of adoption of this Order until July 1, 1996, the new equipment will be optional for broadcasters.[197] After that date the equipment will be required. There will be a one year overlap, or "debugging" period from July 1, 1996 to July 1, 1997 to ensure that the new architecture is effective and the equipment is operational. The old EBS equipment must be retained and kept operational during this debugging period. After July 1, 1997, the old two-tone signal will be used as an actual alert signal and not for testing or interstation signalling.

168. More specifically: (1) existing two-tone decoders at broadcast stations must be modified by July 1, 1995 to be capable of decoding the shortened 8 second two-tone signal; (2) after July 1, 1995, stations may transmit the shortened two-tone attention signal for not less than eight seconds nor more than 25

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[196] The timetable we establish in this Order will allow manufacturers ample opportunity to obtain FCC type acceptance and certification for their new equipment and to produce enough units to supply 13,000 broadcast stations and over 10,000 cable systems.

[197] See Appendix E, § 11.11 and Appendix G for specifics of the transition period.

seconds;[198] (3) use of the new EAS digital signal is optional until July 1, 1996 for broadcast stations; (4) key EAS sources are advised to begin using the new digital signal as soon as equipment is available; (5) after July 1, 1997, the two-tone must be used only as an audio alert signal for the monthly test and actual emergency messages; and (6) class D FM and low power television stations must have decoders according to the above timetable for broadcasters.

169. Cable. Because the cable industry is a newcomer to EAS and will likely require a longer time period to integrate the equipment into facilities, to consolidate headends further, and to implement new plant configurations, we will grant cable systems an additional one year to install EAS equipment. Cable systems must provide all audio override and video on at least one channel and must comply with provisions of the rules (see Appendix E) by July 1, 1997. For entities that elect at this time to voluntarily provide EAS to their customers, they are encouraged to follow the same implementation timetable as cable.

170. In order to encourage rapid manufacture and deployment of the new EAS equipment, we will authorize immediate use of the equipment on an EAS state or local area basis. This includes performing the new monthly on-air and weekly unobtrusive tests in lieu of the existing weekly on air two-tone tests. Authorization can be obtained through written request to the Commission's EAS office after all broadcast stations in an EAS local area have installed new EAS required equipment, demonstrated representation of cable systems in their state or local emergency communications committee plans, and complied with the new Part 11 requirements. At that time, the old EBS equipment may be removed.

VIII. CONCLUSION

171. With this Report and Order/Further Notice of Proposed Rule Making, we adopt new rules for the establishment of an Emergency Alert System that is designed with a flexible architecture to accommodate current and future technologies and that will deliver instantaneous emergency information to the public. The new rules will require the participation of broadcast and cable systems and encourage additional voluntary participation by eliminating many of current obsolete technical requirements and operational burdens. The new system will emphasize speed, reliability, and efficiency.

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[198] Stations that alert locations that have unmodified or old decoders should continue to transmit at least 20 seconds of two-tone to ensure that those locations are alerted to emergencies.

172. We will also be seeking further comment on how MDS, and SMATV and VDT should participate in EAS and whether a defined class of "small" cable systems should be excused from participation.

173. This new system will give greater protection to the American public during emergencies regardless of their activity, special language needs, or individual impairments. The new rules adopted by this Order provide a variety of options for sending and receiving emergency alerts. They are flexible enough to allow for future changes in technologies and consumer products in ways we cannot presently predict, but for which we must be prepared.

IX. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

174. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 603, the Commission's final regulatory flexibility analysis for the foregoing Report and Order is as follows:

I. **Need and Purpose of this action:** Technologies have dramatically improved since the last major modifications to the EBS. The new EAS will significantly improve the ability to safeguard the American public during emergencies and ensure that there is compatibility in equipment through the adoption of new emergency alerting equipment. A new operational structure will streamline and enhance the efficiency of the EAS, a new rule section will prohibit the unauthorized transmission of the EAS alerting signal, and new special codes will be utilized to ensure the public's safety.

II. **Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:** There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. **Significant alternatives considered:** There were no significant alternatives considered that could better accomplish the modernization of the presently outdated EBS.

B. Initial Regulatory Flexibility Analysis

175. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 603, the Commission's initial analysis for the foregoing Further Notice of Proposed Rule Making is as follows.

176. **Need and Objectives of this Action:** Cable systems who are required to participate in the EAS will have to make an initial capital investment to do so. The Commission is concerned that such a requirement could prove burdensome for some smaller

cable systems and therefore seeks comment on whether and to what extent smaller cable systems should not have to participate in the EAS. The Commission also seeks further comments on how cable companies should recover any cost of participating in the new EAS. The Commission asks whether additional technologies such as the Multipoint Distribution Service, Satellite Master Antenna Television and Video Dial Tone should be required to participate in EAS. Finally, the Commission seeks comment on whether and to what extent additional or more stringent requirements imposed by local franchising authorities for emergency alerting pose a threat to the federal purpose and should be preempted.

177. **Legal Basis:** This action is proposed in accordance with Sections 1, 4(i) and (o), 303(r), and 624(g) of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i) and (o), 303(r) and 624(g).

178. **Description, Potential Impact and Number of Small Entities Affected:** There are approximately 11,000 cable systems who are required to participate in the EAS. Depending on whether and to what extent the Commission decides to waive participation by smaller cable systems in the EAS, some portion of these systems will not be required to purchase the EAS equipment and participate in EAS. There are an unknown number of MDS licensees in operation and an unknown number of unregulated SMATV systems in existence. Most of these are likely to be small entities. If the Commission requires MDS and SMATV systems to participate in the EAS, they will have to make a capital investment to purchase necessary equipment. The size of this investment will depend on the extent to which the Commission requires them to participate in the EAS.

179. **Recording, Record Keeping and Other Compliance Requirements:** Smaller cable, MDS, SMATV, and Video Dial Tone systems would be required to keep records of when encoders and decoders are taken out of service for any modifications adopted and when they are returned to operation. This is a current requirement for participants.

180. **Federal Rules which Overlap, Duplicate or Conflict with this Rule:** None.

181. **Any Significant Alternatives Minimizing the Impact on Small Entities and Existing Licensees and Consistent with the Stated Objectives:** Because the new EAS system depends for its effectiveness on all participants using the same equipment and operating procedures, there is a limited amount of flexibility, short of not requiring participation in EAS at all, that the Commission can afford without compromising the utility of EAS. Not requiring participation in the EAS at all, however, could have adverse effects on the public in case of an emergency.

182. **Comment Provision.** Pursuant to the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules and Regulations, interested parties may file comments on or before February 22, 1995 and reply comments on or before March 24, 1995. Parties submitting comments should include any statistical data or analyses and the methodology for arriving at their conclusions in their comments. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, Docket 91-171/91-301, participants must file an original and six copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Comments and reply comments should be sent to Office of Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center(Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

183. **Ex Parte Rules - Non-Restricted Proceeding.** This is a non-restricted notice and comment rule-making proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. § 1.1202, 1.1203, and 1.1206(a).

X. ORDERING CLAUSE

184. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 4(i) and (o), and 303(r), 624(g), and 706 of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154(i) and (o), and 303(r), 544(g), and 606, Part 73, Subpart G, of the Commission's Rules and Regulations IS REMOVED in its entirety. The attached new rules are incorporated into a new Part 11 of Title 47 of the Code of Federal Regulations, as set forth in Appendix E.

185. IT IS FURTHER ORDERED, that Section 0.311 of the Commission's Rules is amended as set forth in Appendix E.

186. IT IS FURTHER ORDERED, that this Report and Order will be effective thirty (30) days after publication of a summary thereof in the Federal Register.

187. IT IS FURTHER ORDERED, that pursuant to the provisions of Sections 1, 4(i) and (o), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i) and (o), and 303(r), there is HEREBY INSTITUTED a Further Notice of Proposed Rule Making into the matters discussed above.

188. IT IS FURTHER ORDERED, that a copy of this Report and Order and Further Notice of Proposed Rule Making shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

189. For further information on this Report and Order and Further Notice of Proposed Rule Making, contact Helena Mitchell, FCC Compliance and Information Bureau, Room 720, 1919 M Street, N.W., 20554, (202) 418-1220.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

COMMENTS FOR FO DOCKET 91-301/91-171

1. KJQY (FM); filing city, Washington, DC
2. State of Delaware, Department of Public Safety, Emergency Planning and Operations Division; Delaware City, Delaware
3. State of Ohio Adjutant General's Department; Columbus, Ohio
4. WVMX; South Burlington, Vermont
5. WNGO-WXID; Mayfield, Kentucky
6. South Carolina Broadcasters Association; Columbia, South Carolina
7. KWFM/KWFM-FM; Tucson, Arizona
8. The South Carolina Division of Information Resource Management; filing city, Washington, DC
9. Dynatech Cable Products Group; Salt Lake City, Utah
10. EBS Waco Operation Area; Waco, Texas
11. Lee Sutherlard Parr, Broadcast Engineer; Pedlar Mills, Virginia
12. RE AMERICA, INC.; Westlake, Ohio
13. Charles William Sepmeier; Avon, Colorado
14. Broadcast Services of Colorado, Inc.; Lakewood, Colorado
15. Burk Technology, Inc.;
16. Cablevision Industries Corp.; filing city, Washington, DC
17. Capital Cities/ABC, Inc.; New York, New York
18. Consumer Electronics Group Electronic Industries Association; Washington, DC
19. Community Broadcasters Association; filing city, Washington, DC
20. CUE Network Corporation; filing city, Washington, DC
21. Gorman-Redlich; Athens, Ohio
22. Information Age Systems, Inc.; Salt Lake City, Utah
23. InterMedia Partners; filing city, Washington, DC
24. KGB-FM/KPOP (AM); San Diego, California
25. National Association of Broadcasters; Washington, DC
26. National Cable Television Association, Inc. and Community Antenna Television Association, Inc.; filing city, Washington, DC
27. National Public Radio; Washington, DC
28. New York State Commission on Cable Television; Albany, New York
29. William F. Ruck Jr., Broadcast Engineer; San Francisco, California
30. Sage Alerting Systems, Inc.; Stamford, Connecticut
31. Scientific-Atlanta; Atlanta, Georgia
32. The Society of Broadcast Engineers, Incorporated; filing city, Washington, DC
33. The Society of Cable Television Engineers; filing city, Washington, DC
34. State of New Jersey, Board of Regulatory Commissioners; Newark, New Jersey

35. TFT, Inc.; Santa Clara, California
36. Time Warner Entertainment Company, L.P.; filing city, Washington, DC
37. United States Satellite Broadcasting Company, Inc.; filing city, Washington, DC
38. Westinghouse Broadcasting Company, Inc.; filing city, Washington, DC
39. WHBC/WHBC-FM; Canton, Ohio
40. WWLI/WLKW; Providence, Rhode Island
41. Kentucky Broadcasters Association; Lebanon, Kentucky
42. Consumer Electronics Group of the Electronic Industries Association; filing city, Washington, DC
43. Kevin Mark Corwin, Student; California
44. WLBN - WLSK Radio; Lebanon, Kentucky
45. Nutmeg Broadcasting Company, Connecticut Broadcasters Association; Connecticut
46. Rhode Island Broadcasters' Association; Rhode Island
47. WSNE; East Providence, Rhode Island
48. WRVN; Lexington, Nebraska
49. San Mateo Operational Area Office of Emergency Services; Redwood City, California
50. Idaho State Broadcast Association; Boise, Idaho
51. Long Island Radio Broadcasters Association; Melville, New York
52. WTAI Talk Radio; Milbourne, Florida
53. Radio Harlan, Inc.; Harlan, Kentucky
54. Washington Area Broadcasters Association; Washington, DC
55. State of Nebraska, State Civil Defense Agency; Lincoln, Nebraska
56. AM/FM Services Company; Edmond, Oklahoma
57. WLRS-FM; Louisville, Kentucky
58. Multi-Technical Services, Inc; Clayton, North Carolina
59. Pennsylvania Emergency Management Agency; Harrisburg, Pennsylvania
60. Axcess, USA; Metairie, Louisiana
61. Jefferson County Emergency Management; Beaumont, Texas
62. Quad Dimension, Inc.; Overland Park, Kansas
63. National Weather Service; Silver Spring, Maryland
64. State of Minnesota Department of Public Safety; St. Paul, Minnesota
65. WBOY-TV; Clarkburg, West Virginia

APPENDIX B

REPLY COMMENTS FOR FO DOCKET 91-301/91-171

1. Middlesex County Emergency Management; Sayreville, New Jersey
2. KFGG Radio; Corpus Christi, Texas
3. Bell Atlantic Companies; filing city, Washington, DC
4. Capital Cities/ABC, Inc.; New York, New York
5. Dynatech; Salt Lake City, Utah
6. EBS Waco Operational Area; Waco, Texas
7. National Association of Broadcasters; Washington, DC
8. SAGE Alerting Systems, Inc.; Stamford, Connecticut
9. SCOPE CABLE TELEVISION; Blair, Nebraska
10. Time Warner Entertainment Company, L.P.; filing city, Washington, DC
11. U.S. Telephone Association; Washington, DC
12. Westinghouse Broadcasting Company, Inc.; Washington, DC
13. Kenneth A. Wright; Englewood, Colorado
14. CBS, Inc.; filing city, New York, New York
15. WDAF-AM/KYYS-FM; Kansas City, Missouri
16. Federal Emergency Management Agency; Washington, DC

APPENDIX C

COMMENTS FOR PN FO DOCKET 91-301/91-171

1. Self Help for Hard of Hearing People; Martinez, California
2. Jefferson County Emergency Management; Beaumont, Texas
3. Rohde & Schwarz; Lanham, Maryland
4. Axcess USA; Metairie, Louisiana
5. EBS Waco Operational Area; Waco, Texas
6. Information Age Systems, Inc.; Salt Lake City, Utah
7. Jefferson County; Beaumont, Texas
8. RE AMERICA; Westlake, Ohio
9. WIN Communications Inc.; Norwalk, Connecticut
10. Duke Baugh; Baltimore, Maryland
11. Nutmeg Broadcasting Company; Connecticut
12. Connecticut State Emergency Communications Committee; Wethersfield, Connecticut
13. Nicholas Lemonakis; Baltimore, Maryland
14. South Carolina Broadcasters Association; Columbia, South Carolina
15. Mountain Cablevision; Frazier Park, California
16. University of Colorado at Colorado Springs; Colorado Springs, Colorado
17. WVMX; Stowe, Vermont
18. The American Council of the Blind of Maryland; Lutherville, Maryland
19. ALBRIT Technologies Limited; New York, New York
20. Capital Cities/ABC, Inc.; New York, New York
21. CUE Network Corporation; Irvine, California
22. Data Broadcasting Corporation Group; San Mateo, California
23. Denon/Nippon Columbia; Rockaway, New Jersey
24. Hammett & Edison; Burlingame, California
25. Information Age Systems, Inc.; Salt Lake City, Utah
26. Intermedia Partners; filing city, Washington, DC
27. Middlesex County Emergency Management; Sayreville, New Jersey
28. National Association of Broadcasters; filing city, Washington, DC
29. National Cable Television Association, Inc.; Fairfax, Virginia
30. Safely Alert Monitor; Greeley, Nebraska
31. SAGE Alerting Systems, Inc.; Stamford, Connecticut
32. South Carolina Broadcasters Association; Columbia, South Carolina
33. Time Warner Entertainment Company, L.P.; New York, New York
34. TFT Inc.; Santa Clara, California
35. Richard T. Walsh, Vice President/Chief Engineer;
36. Mountain Cablevision, Inc.; New York, New York
37. Country Cable, Inc.; San Diego, California
38. Centro de instrumentacion y registro sismico, a.c.; Mexico City, Mexico

39. Idea/onics; Mayville, North Dakota
40. Northern Virginia Resource Center for Deaf and Hard of Hearing Persons; Fairfax, Virginia
41. The Small Cable Business Association; Coraopolis, Pennsylvania
42. National Center for Law and Deafness; filing city, Washington, DC

REPLY COMMENTS FOR PN FO DOCKET 91-301/91-171

1. Data Broadcasting Corporation; San Mateo, California
2. Idea/onics; Mayville, North Dakota
3. The National Cable Television Association, Inc., and The Cable Telecommunications Association, Inc.; Fairfax, Virginia
4. WANN (AM); Annapolis, Maryland
5. Dynatech; Salt Lake City, Utah
6. Electronic Industries Association; Washington, D.C.
7. HollyAnne Corporation; Greely, Nebraska
8. Sage Alerting Systems, Inc.; Stamford, Connecticut
9. TFT, Inc.; Santa Clara, California
10. Albrit Technologies Limited and Altronix Systems Corp.; New York, New York

APPENDIX D

FIELD TEST PARTICIPANTS

Western Test - Denver, Colorado

1. Amateur Radio Operators: KBOHIO; Thorton, Colorado: NOLDZ; Thorton, Colorado: NOOMA; Westminster, Colorado: KOZL; Arvado, Colorado: NOTAO; Golden, Colorado: WD8RJK; Littleton, Colorado: NOPDB; Denver, Colorado
2. CADCO; Garland, Texas
3. California Office of Emergency Services; Sacramento, California
4. Capital Cities/ABC; New York, New York
5. CMBE; Denver, Colorado
6. Colorado - SECC Chair; Lakewood, Colorado
7. Colorado Division of Disaster Emergency Services; Golden, Colorado
8. Colorado State University; Denver, Colorado
9. Cue Network Corp.; Irvine, California
10. Dynatech; Salt Lake City, Utah
11. EBS Advisory Committee; Hollywood, California
12. Electronic Industries Association; Washington, DC
13. Federal Communications Commission; Washington, DC; Lakewood, Colorado; Baltimore, MD; Grand Island, Nebraska
14. Gorman - Redlich Manufacturing; Athens, Ohio
15. Federal Emergency Management Agency; Denver, Colorado
16. Hammett & Edison; San Francisco, California
17. Information Age Systems; Salt Lake City, Utah
18. Information Systems Laboratories, Inc.; Vienna, Virginia
19. JC Humke and Associates; Aurora, Colorado
20. KBNO AM (Spanish language station); Denver, Colorado
21. KCFR-FM, NPR Network; Denver, Colorado
22. KCNC-TV; Denver; Colorado
23. KOA-AM; Denver; Colorado
24. KRFX-FM; Denver; Colorado
25. KRMA-TV; Denver; Colorado
26. National Public Radio; Washington, DC
27. National Telecommunications and Information Administration; Boulder, Colorado
28. National Weather Service; Denver, Colorado
29. NEMAR; Dallas, Texas
30. NOAA NWS; Kansas City, Missouri
31. Public Service Company of Colorado; Denver, Colorado
32. SAGE; Stamford Connecticut
33. SAM; Greeley, Nebraska
34. Self Help for Hard of Hearing People; Martinez, California
35. Society of Cable Television Engineers; Englewood, Colorado
36. Storm Watcher; Jackson, Mississippi
37. TCI of Colorado; Englewood, Colorado
38. TFT; Santa Clara, California

39. Time Warner Cable; Englewood, Colorado
40. University of Denver, Mass Communications Department; Denver, Colorado
41. WANN; Annapolis, Maryland
42. WBAL AM/TV, WIYY (FM); Baltimore, Maryland

Eastern Test - Pikesville, Maryland

1. Adelphia Cable Communications; Staunton, Virginia
2. Altronix Systems Corporation; Denville, New Jersey
3. ARRL; College Park, Maryland
4. Axcess USA; Metairie, Louisiana
5. Baltimore County Office of Emergency Preparedness; Towson, Maryland
6. Baltimore Gas and Electric; Baltimore, Maryland
7. CAN/AM Consulting Limited; Queenstown, Maryland
8. Capital Cities/ABC; New York, New York
9. Carroll County Emergency Management; Westminster, Maryland
10. City of Annapolis Public Transportation; Annapolis, Maryland
11. Colorado - SECC Chair; Lakewood, Colorado
12. Comcast Cablevision of Maryland, Inc.; Timonium, Maryland
13. CUE Network; Irvine, Calfornia
14. Denon America; Rockaway, New Jersey
15. Dynatech; Salt Lake City, Utah
16. EBSAC Technical Standards Chair; Whittier, California
17. Electronic Industries Association; Washington, DC
18. Federal Communications Commission; Washington, DC; Baltimore, Maryland; Columbia, Maryland
19. Gallaudet University; Washington, DC
20. Gorman Redlich Manufacturing; Athens, Ohio
21. Hartford County Division of Emergency Operations; Forest Hill, Maryland
22. Hollyanne - SAM; Greeley, Nebraska
23. Howard County Office of Emergency Management & Civil Defense; Columbia, Maryland
24. IDB Broadcast; Washington, DC
25. Information Age Systems; Salt Lake City, Utah
26. Information Systems Laboratories, Inc.; Vienna, Virginia
27. Maryland Emergency Management Agency; Pikesville, Maryland
28. Maryland Public Television; Owings Mills, Maryland
29. National Association of Broadcasters; Washington, DC
30. National Weather Service; Baltimore, Maryland
31. Prince George's County Office of Emergency Prepardness; Landover, Maryland
32. SAGE; Stamford, Connecticut
33. SECC, Louisiana; Hammond, Louisiana
34. SECC, South Carolina; Florence, South Carolina
35. Society of Broadcast Engineers; Baltimore, Maryland
36. Society of Cable Television Engineers; Stauton, VA
37. Television For All; Silver Spring, Maryland
38. TFT, Santa Clara, California
39. U.S. Satellite Broadcasting Co., Inc.; St. Paul, Minnesota

40. United Artist Cable of Baltimore; Baltimore, Maryland
41. WAMD; Aberdeen, Maryland
42. WANN; Annapolis, Maryland
43. WBAL-AM/TV, WIYY-FM; Baltimore, Maryland
44. WCEI AM/FM, Easton, Maryland
45. WERQ; Baltimore, Maryland
46. WJHU-FM; Baltimore, Maryland
47. WMDO AM/TV; Silver Spring, Maryland
48. WPOC; Baltimore, Maryland
49. WSCL FM - NPR Affiliate; Salisbury, Maryland

Specific individuals who represented their company may be found in the complete files of the Western Field Test and Eastern Field Test of Proposed Parameters for the Modernization of the Emergency Broadcast System.

APPENDIX E

Parts 0, 11, 73 and 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 0--COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read as follows:

Authority: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.182 is amended by revising the heading and paragraph (d) to read as follows:

§ 0.182 Chief, Compliance and Information Bureau .

* * * * *

(d) Provides administrative support for the National Advisory Committee (NAC).

* * * * *

3. Section 0.183 is revised to read as follows:

§ 0.183 Emergency Communications Administration.

The Compliance and Information Bureau coordinates the National Security and Emergency Preparedness (NSEP) activities of the Federal Communications Commission including Continuity of Government Planning, the Emergency Alert System (EAS) and other functions as may be delegated during a national emergency or activation of the President's war emergency powers as specified in section 706 of the Communications Act; maintains liaison with FCC Bureaus/Offices, and other government agencies, the telecommunications industry and FCC licensees on NSEP matters; and, as requested, represents the Commission at NSEP meetings and conferences.

4. Section 0.284 is amended by removing paragraph (a)(4) and redesignating paragraphs (a)(5) through (a)(10) as (a)(4) through (a)(9), respectively.

5. Section 0.311 is amended by revising paragraphs (g) and (h) to read as follows:

§ 0.311 Authority delegated.

* * * * *

(g) The Chief, Compliance and Information Bureau is delegated authority to grant waivers of the requirements of Part 11 of this Chapter to participants required to install, operate or test Emergency Alert System (EAS) equipment. The Chief, Compliance and Information Bureau is further authorized to delegate this authority. Waiver requests must made in writing and forwarded to the FCC's EAS office 1919 M Street, NW Washington, DC 20054. Such requests must state the reason why the waiver is necessary and provide sufficient information such as, statements of fact regarding the financial status of the broadcast station, the number of other broadcast stations providing coverage in its service area or the likelihood of hazardous risks to justify a grant of the waiver.

(h) The Chief, Compliance and Information Bureau is delegated authority to execute in the name of the Commission all agreements pertaining to the loan of United States Government property to broadcast stations or other entities participating in the Emergency Alert System (EAS) for national defense purposes. The Chief, Compliance and Information Bureau is authorized to delegate this authority.

PART 11-EMERGENCY ALERT SYSTEM (EAS)

6. A new Part 11 is added to read as follows:

Subpart A - General

Sec.

11.1 Purpose.
11.11 The Emergency Alert System (EAS.
11.12 Two-tone Attention Signal Encoder and Decoder.
11.13 Emergency Action Notification (EAN) and Emergency Action Termination (EAT).
11.14 EAN Network and Primary Entry Point (PEP) System.
11.15 EAS Operating Handbook.
11.16 National Control Point Procedures.
11.17 Authenticator Word Lists.
11.18 EAS Designations.
11.19 EAS Non-participating National Authorization Letter.
11.20 State Relay Network.
11.21 State and Local Area Plans and FCC Mapbook.

Subpart B - Equipment Requirements

11.31 EAS protocol.

11.32 EAS Encoder.
11.33 EAS Decoder.
11.34 Acceptability of the equipment.
11.35 Equipment operational readiness.

Subpart C - Organization

11.41 Participation in EAS.
11.42 Participation by communications common carriers.
11.43 National level participation.
11.44 EAS message priorities.
11.45 Prohibition of false or deceptive EAS transmissions.
11.46 EAS public service announcements.

Subpart D - Emergency Operations

11.51 EAS code and Attention Signal Transmission requirements.
11.52 EAS code and Attention Signal Monitoring requirements.
11.53 Dissemination of Emergency Action Notification.
11.54 EAS operation during a National Level emergency.
11.55 EAS operation during a State or Local Area emergency.

Subpart E - Tests

11.61 Tests of EAS procedures.
11.62 Closed Circuit Tests of National Level EAS facilities.

Authority: 47 U.S.C. 151, 154(i) and (o), 303(r), 544(g) and 606.

Subpart A - General

§ 11.1 Purpose.

This part contains rules and regulations providing for an Emergency Alert System (EAS). The EAS provides the President with the capability to provide immediate communications and information to the general public at the National, State and Local Area levels during periods of national emergency. The rules in this part describe the required technical standards and operational procedures of the EAS for AM, FM and TV broadcast stations, cable systems and other participating entities. The EAS may be used to provide the heads of State and local government, or their designated representatives, with a means of emergency communication with the public in their State or Local Area.

§ 11.11 The Emergency Alert System (EAS).

(a) The EAS is composed of broadcast networks; cable

networks and program suppliers; AM, FM and TV broadcast stations; Low Power TV (LPTV) stations; cable systems; and other entities and industries operating on an organized basis during emergencies at the National, State, or local levels. It requires that at a minimum all participants use a common EAS protocol, as defined in § 11.31, to send and receive emergency alerts in accordance with the effective dates in the following tables:

TIMETABLE

BROADCAST STATIONS

Requirement	Until 7/1/95	7/1/95	7/1/96	7/1/97
Two-tone encoder timing	20-25 seconds	8-25 seconds	8-25 seconds	8-25 seconds [1]
Two-tone decoder timing	8-16 seconds required. 3-4 seconds optional.	All decoders at 3-4 seconds.	3-4 seconds	Two-tone decoder no longer used.
Digital decoder and encoder	Use is optional	Use is optional	Use is required	Use is required

CABLE SYSTEMS

Requirement	Until 7/1/97	7/1/97 [2]
Two-tone signal from storage device [1]	Use is optional, 8-25 seconds	Use is required, 8-25 seconds
Digital decoder and encoder	Use is optional	Use is required [2]

1/ Two-tone signal used only to provide audio alert to audience before EAS emergency messages and required monthly test.

2/ On this date, subject cable systems shall provide: (1) a video message on all channels or other alerting techniques to hearing impaired and deaf subscribers, (2) an audio message and video interruption on all channels, and (3) a video message on at least one channel to all subscribers.

NOTE: Class D FM and low power TV stations are not required to have two-tone or digital encoders. LPTV stations that operate as television broadcast translator stations are exempt from the requirement to have EAS equipment.

EAS TIMETABLE AND REQUIREMENTS

BROADCAST STATIONS

Requirement	AM	FM	FM Class D	TV	LPTV [1]
Two-tone decoder (until 7/1/97)	Y	Y	Y	Y	Y
Two-tone encoder	Y	Y	N	Y	N
Digital decoder (7/1/96)	Y	Y	Y	Y	Y
Digital encoder (7/1/96)	Y	Y	N	Y	N
Audio message (7/1/96)	Y	Y	Y	Y	Y
Video message (7/1/96)				Y	Y

CABLE SYSTEMS

Requirement	
Two-tone decoder	N
Two-tone encoder	N
Digital decoder (7/1/97)	Y
Digital encoder (7/1/97)	Y
Audio message on all channels (7/1/97)	Y [2]
Video interruption on all channels, video message on one channel (7/1/97)	Y [3]

1/ LPTV stations that operate as television broadcast translator stations are exempt from the requirement to have EAS equipment.
2/ Shall transmit two-tone signal, but it may be from a storage device.
3/ Shall provide video on all channels or other alerting techniques to certified hearing impaired and deaf subscribers.

(b) Class D non-commercial educational FM stations as defined in § 73.506 and LPTV stations as defined in § 74.701(f) are not required to comply with § 11.32. LPTV stations that operate as television broadcast translator stations, as defined in § 74.701(b) are not required to comply with the requirements of this part.

(c) Organizations using other communications systems or technologies such as, Direct Broadcast Satellite (DBS), low earth orbit satellite systems, paging, computer networks, etc. may join the EAS on a voluntary basis by contacting the FCC. Organizations that choose to voluntarily participate must comply with the requirements of this part.

§ 11.12 Two-tone Attention Signal Encoder and Decoder.

Existing two-tone Attention Signal Encoder and Decoder equipment type accepted for use as Emergency Broadcast System equipment under Part 73 may be used by broadcast stations until July 1, 1997, provided that such equipment meets the requirements of § 11.32(a)(9) and 11.33(b). Effective July 1, 1997, the two-tone Attention Signal Decoder will no longer be required and the two-tone Attention Signal will be used to provide an audio alert.

§ 11.13 Emergency Action Notification (EAN) and Emergency Action Termination (EAT).

(a) The Emergency Action Notification (EAN) is the notice to all broadcast stations, subject cable systems, other regulated services of the FCC, participating industry entities, and to the general public that the EAS has been activated for a national emergency.

(b) The Emergency Action Termination (EAT)is the notice to all broadcast stations, subject cable systems, other regulated services of the FCC, participating industry entities, and to the general public that the EAN has terminated.

§ 11.14 EAN Network and Primary Entry Point (PEP) System.

(a) The EAN network is a dedicated communications service connecting industry networks, wire services and common carriers with government activation points. It is used to distribute EAN and EAT messages. The industry control locations retransmit the EAN message, the Presidential message, and the EAT message on their facilities to their affiliates.

(b) The PEP system is a nationwide network of broadcast stations connected with government activation points. It can also be used to distribute EAN and EAT.

§ 11.15 EAS Operating Handbook.

The EAS Operating Handbook states in summary form the actions to be taken by personnel at broadcast stations, and other participating entities upon receipt of an EAN, subject cable

systems and other participating entities upon receipt of an EAN, an EAT, tests, or State and Local Area alerts. It is issued by the FCC and contains instructions for the above situations, monitoring guidelines, and EAS message examples. A copy of the Handbook must be located at normal duty positions or EAS equipment locations when an operator is required to be on duty and be immediately available to staff responsible for authenticating messages and initiating actions.

§ 11.16 National Control Point Procedures.

(a) The National Control Point Procedures are written instructions issued by the FCC to national level EAS control points. They are for use by the participating radio and television networks, cable networks and program suppliers, common carriers and wire services. The procedures are divided into sections as follows:

(1) *National Level EAS Activation.* This section contains the activation and termination instructions for Presidential messages.

(2) *EAS Test Transmissions.* This section contains the instructions for testing the EAS at the National level.

(3) *National Information Center (NIC).* This section contains instructions for distributing United States Government official information messages after completion of the National Level EAS activation and termination actions.

§ 11.17 Authenticator Word Lists.

There are three lists issued by the FCC annually. The lists are to be used by EAS participants to ensure that the National level alerts and tests are legitimate. The lists must be used in accordance with directions in the EAS Operating Handbook and the National Control Point Procedures. LPTV stations do not receive authenticator lists.

(a) *Red Envelope Authenticator List.* This list is used for authentication purposes in accordance with instructions in the EAS Operating Handbook and National Control Point Procedures. It is issued to all broadcast stations and specified control points of the radio and television networks, cable networks and program suppliers, common carriers, wire services and other specified entities. A current copy of this list must be located in the pocket on the inside front cover of the EAS Operating Handbook. This list should be opened only to authenticate receipt of an EAN message and an EAT message from the above control points. The FCC may request immediate return of the Red Envelope at any time.

(b) *White Envelope Authenticator List.* This list is used for caller identification purposes in accordance with instructions in the National Control Point Procedures. It is issued only to specified control points.

(c) *NIC Authenticator List.* This booklet is used for authentication purposes in accordance with instructions in the National Control Point Procedures. It is issued only to participating control points.

§ 11.18 EAS Designations.

(a) National Primary (NP) is a source of EAS Presidential messages.

(b) Local Primary (LP) is a source of EAS Local Area messages. An LP source is responsible for coordinating the carriage of common emergency messages from sources such as the National Weather Service or local emergency management offices as specified in its EAS Local Area Plan. If it is unable to carry out this function, other LP sources in the Local Area may be assigned the responsibility as indicated in State and Local Area Plans. LP sources are assigned numbers (LP-1, 2, 3, etc.) in the sequence they are to be monitored by other broadcast stations in the Local Area.

(c) State Primary (SP) is a source of EAS State messages. These messages can originate from the Governor or a designated representative in the State Emergency Operating Center (EOC) or State Capital. Messages are sent via the State Relay Network.

(d) State Relay (SR) is a relay source of EAS State messages. It is part of the State Relay Network and relays National and State common emergency messages into Local Areas.

(e) Participating National (PN) sources transmit EAS National, State or Local Area messages. The EAS transmissions of PN sources are intended for direct public reception.

(f) Non-participating National (NN) sources have elected not to participate in the National level EAS and hold an authorization letter to that effect. Upon activation of the national level EAS, NN sources are required to broadcast the EAS codes, Attention Signal, the sign-off announcement in the EAS Operating Handbook and then stop operating. All NN sources are required to comply with § 11.51, § 11.52 and § 11.61 of this part. They may transmit EAS State or Local Area messages at any time without prior notice.

§ 11.19 EAS Non-participating National Authorization Letter.

This authorization letter is issued by the FCC to broadcast station licensees. It states that the licensee has agreed to go off the air during a national level EAS message. This authorization will remain in effect through the period of the initial license and subsequent renewals from the time of issuance unless returned by the holder or suspended, modified or withdrawn by the Commission.

§ 11.20 State Relay Network.

This network is composed of State Relay (SR) sources, leased common carrier communications facilities or any other available communication facilities. The network distributes State EAS messages originated by the Governor or designated official. In addition to EAS monitoring, satellites, microwave, FM subcarrier or any other communications technology may be used to distribute State emergency messages.

§ 11.21 State and Local Area Plans and FCC Mapbook.

EAS plans contain guidance for broadcast personnel, emergency officials and NWS personnel to activate the EAS. The plans include the EAS header codes and messages that will be transmitted by key EAS sources (NP, LP, SP and SR).

(a) The State plan contains procedures for State emergency management and other State officials, the NWS, broadcast personnel to transmit emergency information to the public during a State emergency using the EAS.

(b) The Local Area plan contains procedures for local officials or the NWS to transmit emergency information to the public during a local emergency using the EAS. Local plans may be a part of the State plan. A Local Area is a geographical area of contiguous communities or counties that may include more than one state.

(c) The FCC Mapbook is based on the above plans. It organizes all broadcast stations and cable systems according to their State, EAS Local Area and EAS designation.

Subpart B - Equipment Requirements

§ 11.31 EAS protocol.

(a) The EAS uses a four part message for an emergency activation of the EAS. The four parts are: Preamble and EAS Header Codes; audio Attention Signal; message; and, Preamble and EAS End Of Message (EOM) Codes.

(1) The Preamble and EAS Codes must use Audio Frequency Shift Keying at a rate of 520.83 bits per second to transmit the codes. Mark frequency is 2083.3 Hz and space frequency is 1562.5 Hz. Mark and space time must be 1.92 milliseconds. Characters are ASCII seven bit characters as defined in ANSI X3.4-1977.

(2) The Attention Signal must be made up of the fundamental frequencies of 853 and 960 Hz. The two tones must be transmitted simultaneously. The Attention Signal must be transmitted after the EAS header codes.

(3) The message may be audio, video or text.

(b) The ASCII dash and plus symbols are required and may not be used for any other purpose. Unused characters must be ASCII space characters. FM or TV call signs must use a backslash ASCII character (/) in lieu of a dash.

(c) The EAS protocol, including any codes, must not be amended, extended or abridged without FCC authorization. The EAS protocol and message format are specified in the following representation. Examples are also provided in the EAS Operating Handbook.

[PREAMBLE]ZCZC-ORG-EEE-PSSCCC+TTTT-JJJHHMM-LLLLLLLL-
(one second pause)
[PREAMBLE]ZCZC-ORG-EEE-PSSCCC+TTTT-JJJHHMM-LLLLLLLL-
(one second pause)
[PREAMBLE]ZCZC-ORG-EEE-PSSCCC+TTTT-JJJHHMM-LLLLLLLL-
(at least a one second pause)
(transmission of 8 to 25 seconds of Attention Signal)
(transmission of audio, video or text messages)
(at least a one second pause)
[PREAMBLE]NNNN
(one second pause)
[PREAMBLE]NNNN
(one second pause)
[PREAMBLE]NNNN
(at least one second pause)

[PREAMBLE] This is a consecutive string of bits (sixteen bytes of AB hexadecimal[8 bit byte 10101011]) sent to clear the system, set AGC and set asynchronous decoder clocking cycles. The preamble must be transmitted before each header and End Of Message code.

ZCZC- This is the identifier, sent as ASCII characters ZCZC to indicate the start of ASCII code.

ORG- This is the Originator code and indicates who originally initiated the activation of the EAS. These codes are specified in paragraph (d) of this section.

EEE- This is the Event code and indicates the nature of the EAS activation. The codes are specified in paragraph (e) of this section. The Event codes must be compatible with the codes used by the NWS Weather Radio Specific Area Message Encoder (WRSAME).

PSSCCC- This is the Location code and indicates the geographic area affected by the EAS alert. There may be 31 Location codes in an EAS alert. The Location code uses the Federal Information Processing System (FIPS) numbers as described by the U.S. Department of Commerce in National Institute of Standards and Technology publication 772. Each state is assigned an SS number as specified in paragraph (f) of this section. Each county is assigned a CCC number. A CCC number of 000 refers to an entire State or Territory. P defines county subdivisions as follows: 0 = all or an unspecified portion of a county, 1 = Northwest, 2 = North Central, 3 = Northeast, 4 = West Central, 5 = Central, 6 = East Central, 7 = Southwest, 8 = South Central, 9 = Southeast. Other numbers may be designated later for special applications. The use of county subdivisions will probably be rare and generally for oddly shaped or unusually large counties. Any subdivisions must be defined and agreed to by the local officials prior to use.

+TTTT- This indicates the valid time period of a message in 15 minute segments up to one hour and then in 30 minute segments beyond one hour; i.e., +0015, +0030, +0045, +0100, +0430 and +0600.

JJJHHMM- This is the day in Julian Calendar days (JJJ) of the year and the time in hours and minutes (HHMM) when the message was initially released by the originator using 24 hour Universal Coordinated Time (UTC). These codes must remain unchanged for retransmitted messsages.

LLLLLLLL- This is the call sign or other identification of the broadcast station, or NWS office transmitting or retransmitting the message. These codes will be automatically affixed to all outgoing messages by the EAS encoder.

NNNN This is the End of Message (EOM) code sent as a string of four ASCII N characters.

(d) The only originator codes are:

Originator	ORG Code
Emergency Action Notification Network	EAN
Primary Entry Point System	PEP
National Weather Service	WXR
Civil authorities	CIV
Broadcast station or cable system	EAS

(e) The following Event (EEE) codes are presently authorized:

Nature of Activation	EVENT CODES
Emergency Action Notification (National only)	EAN
Emergency Action Termination (National only)	EAT
National Information Center	NIC
National Periodic Test	NPT
Required Monthly Test	RMT
Required Weekly Test	RWT

Tornado Watch	TOA
Tornado Warning	TOR
Severe Thunderstorm Watch	SVA
Severe Thunderstorm Warning	SVR
Severe Weather Statement	SVS
Special Weather Statement	SPS
Flash Flood Watch	FFA
Flash Flood Warning	FFW
Flash Flood Statement	FFS
Flood Watch	FLA
Flood Warning	FLW
Flood Statement	FLS
Winter Storm Watch	WSA
Winter Storm Warning	WSW
Blizzard Warning	BZW
High Wind Watch	HWA
High Wind Warning	HWW
Hurricane Watch	HUA
Hurricane Warning	HUW
Hurricane Statement	HLS
Tsunami Watch	TSA
Tsunami Warning	TSW
Evacuation Immediate	EVI
Civil Emergency Message	CEM
Practice/Demo Warning	DMO
Administrative Message	ADR

(f) The State and Territory FIPS number codes (SS) are as follows. County FIPS numbers (CCC) are contained in the State EAS Mapbook.

State	FIPS#	State	FIPS#	State	FIPS#	State	FIPS#	State	FIPS#
AL	01	HI	15	MA	25	NM	35	SD	46
AK	02	ID	16	MI	26	NY	36	TN	47
AZ	04	IL	17	MN	27	NC	37	TX	48
AR	05	IN	18	MS	28	ND	38	UT	49
CA	06	IA	19	MO	29	OH	39	VT	50
CO	08	KS	20	MT	30	OK	40	VA	51
CT	09	KY	21	NE	31	OR	41	WA	53
DE	10	LA	22	NV	32	PA	42	WV	54
FL	12	ME	23	NH	33	RI	44	WI	55
GA	13	MD	24	NJ	34	SC	45	WY	56

District of Columbia - 11

Terr.	FIPS#	Terr.	FIPS#	Terr.	FIPS#	Terr.	FIPS#	Terr.	FIPS#
AS	60	FM	64	GU	66	MH	68	MP	69
PR	72	PW	70	UM	74	VI	78		

§ 11.32 EAS Encoder.

(a) EAS Encoders must at a minimum be capable of encoding the EAS protocol described in § 11.31 and providing the EAS code transmission requirements described in § 11.51. EAS encoders must additionally provide the following minimum specifications:

(1) Encoder programming. Access to encoder programming shall be protected by a lock or other security measures and be configured so that authorized personnel can readily select and program the EAS Encoder with Originator, Event and Location codes for either manual or automatic operation.

(2) Inputs. The encoder shall have two inputs, one for audio messages and one for data messages (RS-232C with standard protocol and 1200 baud rate).

(3) Outputs. The encoder shall have two outputs, one audio port and one data port (RS-232C with standard protocol and 1200 baud rate).

(4) Calibration. EAS Encoders must provide a means to comply with the modulation levels required in § 11.51(f).

(5) Day-Hour-Minute and Identification Stamps. The encoder shall affix the JJJHHMM and LLLLLLLL codes automatically to all initial messages.

(6) Program Data Retention. Program data and codes shall be retained even with the power removed.

(7) Indicator. An aural or visible means that is activated when the Preamble is sent and deactivated at the End of Message code.

(8) Spurious Response. All frequency components outside 200 to 4000 Hz shall be attenuated by 40 dB or more with respect to the output levels of the mark or space frequencies.

(9) Attention Signal generator. The encoder must provide an attention signal that complies with the following:

(i) Tone Frequencies. The audio tones shall have fundamental frequencies of 853 and 960 Hz and not vary over ± 0.5 Hz.

(ii) Harmonic Distortion. The total harmonic distortion of each of the audio tones may not exceed 5% at the encoder output terminals.

(iii) Minimum Level of Output. The encoder shall have an output level capability of at least +8 dBm into a 600 Ohm load impedance at each audio tone. A means shall be provided to permit individual activation of the two tones for calibration of associated systems.

(iv) Time Period for Transmission of Tones. The encoder shall have timing circuitry that automatically generates the two tones simultaneously for a time period of not less than 8 nor longer than 25 seconds. NOTE: Prior to July 1, 1995, the Attention Signal must be at least 20 and not more than 25 seconds.

(v) Inadvertent activation. The switch used for initiating the automatic generation of the simultaneous tones shall be protected to prevent accidental operation.

(vi) Indicator Display. The encoder shall be provided with a visual and/or aural indicator which clearly shows that the Attention Signal is activated.

(b) Operating Temperature and Humidity. Encoders shall have the ability to operate with the above specifications within an ambient temperature range of 0 to +50 degrees C and a range of relative humidity of up to 95%.

(c) Primary Supply Voltage Variation. Encoders shall be capable of complying with the requirements of this section during a variation in primary supply voltage of 85 percent to 115 percent of its rated value.

(d) Testing Encoder Units. Encoders not covered by § 11.34(e) of this part shall be tested in a 10 V/m minimum RF field at an AM broadcast frequency and a 0.5 V/m minimum RF field at an FM or TV broadcast frequency to simulate actual working conditions.

§ 11.33 EAS Decoder.

(a) An EAS Decoder must at a minimum be capable of decoding the EAS protocol described in § 11.31, provide the EAS monitoring functions described in § 11.52, and the following minimum specifications:

(1) Inputs. Decoders must have the capability to receive at least 2 audio inputs from EAS monitoring assignments, and one data input (RS-232C with standard protocol and 1200 baud rate). The data input may be used to monitor other communications modes such as Radio Broadcast Data System (RBDS), NWR, satellite, public switched telephone network, or any other source that uses the EAS protocol.

(2) Valid codes. There must be a means to determine if valid EAS header codes are received and to determine if

preselected header codes are received.

(3) Storage. Decoders must provide the means to:

(i) Record and store at least two minutes of audio or text messages.

(ii) Store at least 10 preselected header codes for comparison with incoming header codes. A non-preselected header code that is manually transmitted must be stored for comparison with later incoming header codes. The header codes of the last ten received valid messages which still have valid time periods must be stored for comparison with the incoming valid header codes of later messages. The header codes will be deleted from storage as their valid time periods expire.

(4) Display. A visual message shall be developed from any valid EAS header codes received. The message will include the Originator, Event, Location, the valid time period of the message and the local time the message was transmitted. The message shall be in the primary language of the broadcast station or cable system and be fully displayed on the decoder and readable in normal light and darkness.

(5) Indicators. EAS Decoders must have a distinct aural or visible means to show that it is activated when:

(i) any valid EAS header codes are received as specified in § 11.33(a)(10).

(ii) preprogrammed header codes, such as those selected in accordance with § 11.52(d) are received

(iii) a signal is present at each audio input that is specified in § 11.33(a)(1).

(6) Program Data Retention. The program data must be retained even with power removed.

(7) Outputs. Decoders shall have the following outputs: a data port or ports (RS-232C with standard protocol and 1200 baud rate) where received valid EAS header codes and received preselected header codes are available; one audio port that is capable of monitoring each decoder audio input; and, an internal speaker to enable personnel to hear audio from each input.

(8) Decoder Programming. Access to decoder programming shall be protected by a lock or other security measures and be configured so that authorized personnel can readily select and program the EAS Decoder with preselected Originator, Event and Location codes for either manual or automatic operation.

(9) Reset. There shall be a method to automatically or manually reset the decoder to the normal monitoring condition. If an end of message code (EOM) is not received for an EAS message, operators shall be able to select an automatic reset time which may not be less than two minutes. Messages received with the EAN Event codes shall disable the reset function so that lengthy audio messages can be handled. The last message received with valid header codes shall be displayed as required by § 11.33(a)(4) of this section before the decoder is reset.

(10) Message Validity. An EAS Decoder must provide error detection and validation of the header codes of each message to ascertain if the message is valid. Header code comparisons may be accomplished through the use of a bit-by-bit compare or any other error detection and validation protocol. A header code

must only be considered valid when two of the three headers match exactly. Duplicate messages must not be relayed automatically.

(11) A header code with the EAN Event code specified in § 11.31(c) of this part that is received through either of the two audio inputs must override all other EAS messages.

(b) Attention Signal. EAS Decoders at broadcast stations shall have detection and activation circuitry that will demute a receiver upon detection of the two audio tones of 853 Hz and 960 Hz. To prevent false responses, decoders designed to use the two tones for broadcast receiver demuting shall comply with the following:

(1) Time Delay. A minimum time delay of 8 but not more than 16 seconds of tone reception shall be incorporated into the demuting or activation process to insure that the tones will be audible for a period of at least 4 seconds. After July 1, 1995, the time delay shall be 3-4 seconds.

(2) Operation Bandwidth. The decoder circuitry shall not respond to tones which vary more than ± 0.5 Hz from each of the frequencies, 853 Hz and 960 Hz.

(3) Reset Ability. The decoder shall have a means to manually or automatically reset the associated broadcast receiver to a muted state.

(b) Decoders shall be capable of operation within the tolerances specified in this section as well as those in §§ 11.32(b), (c) and (d).

§ 11.34 Acceptability of the equipment.

(a) An EAS Encoder used for generating the EAS codes and the Attention Signal must be Certified in accordance with the procedures in Part 2, Subpart J, of this chapter. The data and information submitted must show the capability of the equipment to meet the requirements of this Part as well as the requirements contained in Part 15 of this chapter for digital devices.

(b) Decoders used for the detection of the EAS codes and receiving the Attention Signal must be Certified in accordance with the procedures in Part 2, Subpart J, of this chapter. The data and information submitted must show the capability of the equipment to meet the requirements of this Part as well as the requirements contained in Part 15 of this chapter for digital devices.

(c) The functions of the EAS decoder, Attention Signal generator and receiver, and the EAS Encoder specified in §§ 11.31, 11.32 and 11.33 may be combined and notified as a single unit provided that the unit complies with all specifications in this rule section.

(d) Manufacturers must include instructions and information on how to install, operate and program an EAS Encoder, EAS Decoder, or combined unit and a list of all State and county FIPS numbers with each unit sold or marketed in the U.S.

(e) Waiver requests of the Certification requirements for EAS Encoders or EAS Decoders which are constructed for use at a broadcast station or subject cable system, but are not offered for sale will be considered on an individual basis in accordance

with Part 1, Subpart G, of this chapter.

§ 11.35 Equipment operational readiness.

(a) Broadcast stations and subject cable systems are responsible for ensuring that EAS Encoders, EAS Decoders and Attention Signal generating and receiving equipment used as part of the EAS is installed so that the monitoring and transmitting functions are available during the times the broadcast station or cable system is in operation. Additionally, broadcast stations and subject cable systems must determine the cause of any failure to receive the required tests or activations specified in §§ 11.61(a)(1) and (2). Appropriate entries must be made in the broadcast station log as specified in § 73.1820 and § 73.1840 of this chapter, cable system record in § 76.305 of this chapter indicating reasons why any tests were not received.

(b) If the EAS Encoder or EAS Decoder becomes defective the broadcast station or subject cable system may operate without the defective equipment pending its repair or replacement for a period not in excess of 60 days without further FCC authority. Entries shall be made in the broadcast station log or subject cable system records showing the date and time the equipment was removed and restored to service. For personnel training purposes, the required monthly test script must still be transmitted even though the equipment for generating the EAS message codes, Attention Signal and EOM code is not functioning.

(c) An informal request may be made to the Engineer-in-charge of the FCC field office serving area in which the broadcast station or subject cable system is located for additional time to complete repairs to the defective equipment. These requests must explain what steps have been taken to repair or replace the defective equipment, the alternative procedures being used while the defective equipment is out of service, and when the defective equipment will be repaired or replaced.

Subpart C - Organization

§ 11.41 Participation in EAS.

(a) All broadcast stations and cable systems specified in § 11.11 are categorized as Participating National (PN) sources unless authorized by the FCC to be Non-Participating National (NN) sources.

(b) A broadcast station or cable system may submit a written request to the FCC asking to be a Non-Participating National (NN) source. The FCC may then issue a Non-participating National Authorization letter. NN sources must go off the air during a national EAS activation.

(1) Any existing station that is a Non-participating National (NN) source under § 11.18(f) of this part that wants to become a Participating National (PN) source in the national level EAS must submit a written request to the FCC.

(2) NN sources may voluntarily participate in the State and

Local Area EAS. Participation is at the discretion of broadcast station and cable system management and will be in accordance with the provisions of State and Local Area EAS Plans.

(c) All sources, including NN, must have immediate access to an EAS Operating Handbook and a Red Envelope Authenticator List and be placed on the EAS mailing list maintained by the FCC.

§ 11.42 Participation by communications common carriers.

(a) During activation of the National level EAS, communications common carriers which have facilities available in place may, without charge, connect:

(1) an originating source from the nearest service area to a selected Test Center and then to the radio and television broadcast networks, and cable networks and program suppliers for the duration of the emergency, provided an Emergency Action Notification is issued by the White House and the originating source has a local channel from the originating point to the nearest service area.

(2) An independent broadcast station to the radio and television broadcast networks, and cable networks and program suppliers provided the station has in service a local channel from the station's studio or transmitter directly to the broadcast source.

(b) Upon receipt of the Emergency Action Termination, the common carriers shall disconnect the originating source and the participating independent stations and restore the networks and program suppliers to their original configurations.

(c) During a National level EAS Closed Circuit Test, common carriers which have facilities in place may, without charge, connect an originating source from the nearest service area to a selected Test Center and then to the radio networks and, if participating, any television networks and cable networks and program suppliers. Independent stations will not be connected during the test unless authorized by the FCC. Upon test termination, participants shall be restored to their original configurations.

(d) A common carrier rendering free service shall file with the FCC, on or before July 31st and January 31st of each year, reports covering the six months ending on June 30th and December 31st respectively. These reports shall state what free service was rendered under this rule and the charges in dollars which would have accrued to the carrier for this service if charges had been collected at the published tariff rates if such carriers are required to file tariffs.

§ 11.43 National level participation.

The industry entities voluntarily participating in the national level EAS are:

(a) Radio Networks.

(1) ABC.

(2) Associated Press (APR).

(3) CBS.
(4) CNN.
(5) Jones Satellite Audio.
(6) Moody Broadcasting Network.
(7) Mutual Broadcasting System (MBS).
(8) MUZAK.
(9) NBC.
(10) National Public (NPR).
(11) Unistar.
(12) United Press International (UPIR).
(13) USA.
(b) Television Networks.
(1) ABC.
(2) CBS.
(3) FOX.
(4) NBC.
(5) PBS.
(c) Cable Program Suppliers.
(1) Cable News Network (CNN) and CNN Headline News.
(2) Cinemax.
(3) Disney Channel.
(4) Entertainment and Sports Programming Network (ESPN).
(5) Home Box Office (HBO).
(6) Movie Channel.
(7) MTV.
(8) The Nashville Network.
(9) Nickelodeon.
(10) Showtime.
(11) VH-1.
(12) Weather Channel.
(d) Wire Services.
(1) Associated Press (AP).
(2) Reuters.
(3) United Press International (UPI).
(d) Common Carriers.
(1) American Telephone and Telegraph (AT&T).
(e) Entities that wish to voluntarily participate in the national level EAS may submit a written request to the FCC.

§ 11.44 EAS message priorities.

(a) A national activation of the EAS for a Presidential message with the Event code EAN as specified in § 11.31 must take priority over any other message and preempt it if it is in progress.

(b) EAS participants should transmit other EAS messages in the following order: first, Local Area Messages; second, State Messages; and third, National Information Center (NIC) Messages.

(c) Key EAS sources (NP, LP, SP and SR) and Participating National (PN) sources that remain on the air during a National emergency must carry Presidential Messages "live" at the time of transmission or immediately upon receipt. Activation of the National level EAS must preempt State and Local Area EAS operation.

(c) During a national emergency, the radio and television broadcast network program distribution facilities must be reserved exclusively for distribution of Presidential Messages. NIC messages received from national networks which are not broadcast at the time of original transmission must be recorded locally by LP sources for transmission at the earliest opportunity consistent with the message priorities in paragraph (b) of this section.

§ 11.45 Prohibition of false or deceptive EAS transmissions.

No person may transmit or cause to transmit the EAS codes or Attention Signal, or a recording or simulation thereof, in any circumstance other than in an actual National, State or Local Area emergency or authorized test of the EAS. Broadcast station licensees should also refer to § 73.1217 of this chapter.

§ 11.46 EAS public service announcements.

Broadcast stations may use Public Service Announcements or obtain commercial sponsors for announcements, informercials, or programs explaining the EAS to the public. Such announcements and programs may not be a part of alerts or tests, and may not simulate or attempt to copy alert tones or codes.

§ 11.51 EAS code and Attention Signal Transmission requirements.

(a) Broadcast stations must transmit, either automatically or manually, national level EAS messages and required tests by sending the EAS header codes, Attention Signal, emergency message and End of Message (EOM) using the EAS Protocol. The Attention Signal must precede any emergency audio message. After July 1, 1997, the shortened Attention Signal may only be used as an audio alert signal and the EAS codes will become the minimum signalling requirement for National level messages and tests.

(b) Broadcast stations may transmit only the EAS header codes and the EOM code without the Attention Signal and emergency message for State and local emergencies. Television stations and cable systems should ensure that pauses in video programming before EAS message transmission do not cause television receivers to mute EAS audio messages.

(c) Effective July 1, 1996, all radio and television stations shall transmit EAS messages in the main audio channel.

(1) By the above date, television stations shall transmit a visual message containing the Originator, Event, Location and the valid time period of an EAS message. If the message is a video crawl, it shall be displayed at the top of the television screen or where it will not interfere with other visual messages.

(d) Class D non-commercial educational FM stations as defined in § 73.506 of this chapter and low power TV stations as defined in § 74.701(f) of this chapter are not required to have equipment capable of generating the EAS codes and Attention Signal specified in § 11.31 of this part.

(e) Broadcast stations may additionally transmit EAS messages through other communications means other than the main audio channel. For example, FM stations may transmit the EAS codes on subcarriers including 57 kHz using the RBDS standard produced by the National Radio Systems Committee (NRSC). and television stations may use subsidiary communications services.

(f) Broadcast stations are responsible for ensuring that the equipment for generating the EAS codes and the Attention Signal shall modulate a broadcast station transmitter so that the signal broadcast to other broadcast stations and cable systems alerts them that the EAS is being activated or tested at the National, State or Local Area level. The minimum level of modulation for EAS codes, measured at peak modulation levels using the internal calibration output specified in § 11.32(a)(4) of this part, shall modulate the transmitter at no less than 80% of full channel modulation limits. Measured at peak modulation levels, each of the Attention Signal tones shall be calibrated separately to modulate the transmitter at no less than 40%. These two calibrated modulation levels shall have values that are within 1 dB of each other.

(g) Effective July 1, 1997, cable systems shall transmit EAS audio messages in the same order specified in paragraph (a) of this section. The Attention Signal may be produced from a

storage device. Additionally, subject cable systems must:

(1) install, operate, and maintain equipment capable of generating the EAS codes. The modulation levels for the EAS codes and Attention Signal for cable systems shall comply with the aural signal requirements in § 76.605 of this chapter. This will provide sufficient signal levels to operate cable subscriber television or radio receivers equipped with EAS decoders and to audibly alert subscribers.

(2) provide a video interruption and an audio EAS message on all channels. The audio message must state which channel is carrying the visual EAS message.

(3) Subject cable systems shall transmit a visual EAS message on at least one channel. The message shall contain the Originator, Event, Location and the valid time period of the EAS message. If the visual message is a video crawl, it shall be displayed at the top of the subscriber's television screen or where it will not interfere with other visual messages.

(4) Cable systems shall provide a method to alert hearing impaired or deaf subscribers to EAS messages. Methods may include: a box that displays EAS messages and activates other alerting mechanisms or lights; visual messages on all channels; etc.

(5) Cable systems may elect not to interrupt EAS messages from broadcast stations based on a written agreement between all concerned.

(h) Other technologies and public service providers, such as DBS, low earth orbiting satellites, etc., that wish to participate in the EAS may contact the FCC's EAS office or their State Emergency Communication Committee for information and guidance.

(i) If manual interrupt is used as specified in paragraph (k) of this section, EAS Encoders must be located so that station or cable staff, at normal duty locations, can initiate the EAS code and Attention Signal transmission.

(j) Broadcast stations or cable systems that are co-owned and co-located with a combined studio or control facility, (such as an AM and FM licensed to the same entity and at the same location or a cable headend serving more than one system) may provide the EAS transmitting requirements contained in this section for the combined station or cable system with one EAS Encoder. The requirements of § 11.32 must be met for both the broadcast station and cable system.

(k) Broadcast stations and cable systems are required to transmit all received EAS messages in which the header code contains the Event codes for Emergency Action Notification (EAN), Emergency Action Termination (EAT), and Required Monthly Test (RMT), with the accompanying location codes for their State and State/county. These EAS messages shall be retransmitted unchanged except for the LLLLLLLL- code which identifies the broadcast station or cable system retransmitting the message. See § 11.31(c) of this part. If an EAS source originates any EAS messages with the above Event codes, it must include the location codes for the State and counties in its service area. When transmitting the required weekly test, broadcast stations and

subject cable systems will use the event code RWT. The location codes will be the state and county for the broadcast station city of license or subject cable system community. Other location codes may be included upon approval of station or cable system management approval. EAS code requirements and examples are provided in the EAS Operating Handbook. Operations may be conducted automatically or manually.

(1) Automatic interrupt of programming and transmission of EAS messages is required when facilities are unattended and must include a permanent record that contains at a minimum the following information: Originator, Event, Location and valid time period of the message. The decoder performs the functions necessary to determine which EAS messages are automatically transmitted by the encoder.

(2) Manual interrupt of programming and transmission of EAS messages may be used. EAS messages with the EAN and EAT Event codes must be transmitted immediately and Monthly EAS test messages within 15 minutes. All actions must be logged or recorded.

(l) Broadcast stations and cable systems may employ a minimum delay feature, not to exceed 15 minutes, for automatic interrupt of EAS codes but not for the EAN Event which must be transmitted immediately.

(m) Either manual or automatic operation of EAS equipment may be used at broadcast stations or cable systems that use remote control. If manual operation is used, an EAS decoder must be located at the remote control location and directly monitor the signals of the two assigned EAS sources. If direct monitoring of the assigned EAS sources is not possible at the remote location, automatic operation is required. If automatic operation is used, the remote control location may be used to override the transmission of an EAS message. Broadcast stations and cable systems may change back and forth between automatic and manual operation.

§ 11.52 EAS code and Attention Signal Monitoring requirements.

(a) Before July 1, 1997, broadcast stations must be capable of receiving the Attention Signal required by § 11.32(a)(9) and emergency messages of other broadcast stations during their hours of operation. Effective July 1, 1996, all broadcast stations must install and operate during their hours of operation, equipment capable of receiving and decoding, either automatically or manually, the EAS header codes, emergency messages and EOM code. The effective date for subject cable systems is July 1, 1997. NOTE: after July 1, 1997, the two-tone Attention Signal will not be used to actuate two-tone decoders but will be used as an aural alert signal.

(b) If manual interrupt is used as specified in § 11.51(k)(2) of this part, decoders must be located so that operators at their normal duty stations at broadcast stations and cable systems can be alerted immediately when EAS messages are received.

(c) Broadcast stations or cable systems that are co-owned and co-located with a combined studio or control facility, (such as an AM and FM licensed to the same entity and at the same location or a cable headend serving more than one system) may provide the EAS monitoring requirements contained in this section for the combined station or cable system with one EAS Decoder. The requirements of § 11.33 must be met for the combined station or cable system.

(d) Broadcast stations and subject cable systems must monitor the two EAS sources assigned in accordance with the monitoring priorities in the EAS Operating Handbook. The off-air monitoring assignments of each broadcast station and cable system are specified in the State EAS Plan and FCC Mapbook.

(1) If the required EAS sources cannot be received, alternate arrangements or a waiver may be obtained by written request to the FCC's EAS office. In an emergency, a waiver may be issued over the telephone with a follow up letter to confirm temporary or permanent reassignment.

(2) Broadcast station and cable system management will determine which header codes will automatically interrupt their programming for State and Local Area emergency situations affecting their audiences.

(e) A broadcast station or cable system is required to interrupt normal programming either automatically or manually when it receives an EAS message in which the header code contains the Event codes for Emergency Action Notification (EAN), Emergency Action Termination (EAT), or Required Monthly Test (RMT) for its State or State/county location.

(1) Automatic interrupt of programming is required when facilities are unattended. Automatic operation must provide a permanent record of the EAS message that contains at a minimum the following information: Originator, Event, Location and valid time period of the message.

(2) Manual interrupt of programming and transmission of EAS messages may be used. EAS messages with the EAN Event code must be transmitted immediately and Monthly EAS test messages within 15 minutes. All actions must be logged or recorded. Decoders must be programmed for the EAN and EAT Event header codes for EAS National level emergencies and the RMT and RWT Event header codes for required monthly and weekly tests, with the appropriate accompanying State and State/county location codes.

§ 11.53 Dissemination of Emergency Action Notification.

Initiation of the EAN by any one of the following sources is sufficient to begin the emergency actions in § 11.54 of this part.

(a) National Level. The EAN is issued by the White House. The EAN message is sent from an origination point to control points of the participating radio and television networks, cable networks and program suppliers, wire services, communications common carriers and other entities. It is then disseminated via:

(1) Radio and television broadcast networks to all affiliates with the use of internal alerting facilities.

(2) Cable networks and program suppliers to cable systems and subscribers.

(3) Wire services to all subscribers (AM, FM, TV, LPTV and other stations).

(4) Off-air monitoring of EAS sources.

(b) State level and Local Area levels. EAN dissemination arrangements at these levels originate from State and local governments in accordance with State and Local Area plans.

(c) Broadcast stations must, prior to commencing routine operation or originating any emissions under program test, equipment test, experimental, or other authorizations, determine whether the EAS has been activated by any of the following methods:

(1) Monitor the radio and TV networks and cable systems.

(2) Check the wire services.

(3) Monitor the assigned EAS sources.

§ 11.54 EAS operation during a National Level emergency.

(a) The EAS Operating Handbook summarizes the procedures to be followed upon receipt of a National level EAN or EAT Message.

(b) Immediately upon receipt of an EAN message, broadcast stations and cable systems must:

(1) Monitor the radio and television networks, cable networks and program suppliers, and wire services for further instructions.

(2) Verify the authenticity of the EAN message with the current Red Envelope Authenticator List (broadcast stations only).

(3) Monitor the two EAS sources assigned in the State or Local Area plan or FCC Mapbook for any further instructions.

(4) Discontinue normal programming and follow the transmission procedures in the appropriate section of the EAS Operating Handbook. Announcements may be made in the same language as the primary language of the station.

(i) Key EAS sources (National Primary (NP), Local Primary (LP), State Primary (SP), State Relay (SR) and Participating National (PN) sources) follow the transmission procedures and make the announcements in the National Level Instructions of the EAS Operating Handbook.

(ii) Non-participating National (NN) sources follow the transmission procedures and make the sign-off announcement in the EAS Operating Handbook's National Level Instructions section for NN sources. After the sign-off announcement, NN sources are required to remove their carriers from the air and monitor for the Emergency Action Termination message. NN sources using automatic interrupt under § 11.51(k)(1) of this part, must transmit the header codes, Attention Signal, sign-off announcement and EOM code after receiving the appropriate EAS header codes for a national emergency.

(5) After completing the above transmission procedures, key EAS and Participating National sources must transmit a common emergency message until receipt of the Emergency Action Termination Message. Message priorities are specified in

§ 11.44 of this part. If LP or SR sources of a Local Area cannot provide an emergency message feed, any source in the Local Area may elect to provide a message feed. This should be done in an organized manner as designated in State and Local Area EAS Plans.

(6) The Standby Script shall be used until emergency messages are available. The text of the Standby Script is in the EAS Operating Handbook's section for Participating sources.

(7) TV broadcast stations shall display an appropriate EAS slide and then transmit all EAS announcements visually and aurally as specified in § 73.1250(h) of this chapter.

(8) Announcements may be made in the same language as the primary language of the station.

(9) Broadcast Stations in the International Broadcast Service must cease broadcasting immediately upon receipt of an Emergency Action Notification and must maintain radio silence until an EAT is issued. Such stations may be issued an emergency authorization by the FCC with concurrence of the Director, Office of Science and Technology Policy, to transmit Federal government broadcasts or communications.

(10) Broadcast stations may transmit their call letters and cable systems may transmit the names of the communities they serve during an EAS activation. EAS State and Local Area identifications must be given as provided in State and Local Area EAS plans.

(11) All broadcast stations and cable systems operating and identified with a particular Local Area must transmit a common national emergency message until receipt of the Emergency Action Termination.

(12) Broadcast stations, except those holding an EAS Non-participating National Authorization letter, are exempt from complying with § 73.62 and § 73.1560 of this chapter (operating power maintenance) while operating under this part.

(13) National Primary (NP) sources must operate under the procedures in the National Control Point Procedures.

(14) The time of receipt of the EAN and Emergency Action Termination messages shall be entered in the broadcast station logs (as specified in § 73.1820 and § 73.1840 of this chapter), or the cable system records (as specified in § 76.305 of this chapter).

(c) Upon receipt of an Emergency Action Termination Message, broadcast stations and cable systems must follow the termination procedures in the EAS Operating Handbook.

(d) Broadcast stations and cable systems originating emergency communications under this section shall be considered to have conferred rebroadcast authority, as required by Section 325(a) of the Communications Act of 1934, 47 U.S.C. § 325(a), to other participating broadcast stations and cable systems.

§ 11.55 EAS operation during a State or Local Area emergency.

(a) The EAS may be activated at the State or Local Area levels by broadcast stations and cable systems at their discretion for day-to-day emergency situations posing a threat to

life and property. Examples of natural emergencies which may warrant activation are: tornadoes, floods, hurricanes, earthquakes, heavy snows, icing conditions, widespread fires, etc. Man-made emergencies may include: toxic gas leaks or liquid spills, widespread power failures, industrial explosions, and civil disorders.

(b) EAS operations must be conducted as specified in State and Local Area EAS Plans. The plans must list all authorized entities participating in the State or Local Area EAS.

(c) Immediately upon receipt of a State or Local Area EAS message, participating broadcast stations and cable systems must do the following:

(1) State Relay (SR) sources monitor the State Relay Network or follow the State EAS plan for instructions from the State Primary (SP) source.

(2) Local Primary (LP) sources monitor the Local Area SR sources or follow the State EAS plan for instructions.

(3) Participating National (PN) and Non-participating National (NN) sources monitor the Local Area LP sources for instructions.

(4) Broadcast stations and cable systems participating in the State or Local Area EAS must discontinue normal programming and follow the procedures in the State and Local Area Plans. Television stations must comply with § 11.54(b)(7). Broadcast stations providing foreign language programming shall comply with § 11.54(b)(8) of this part.

(5) Upon completion of the State or Local Area EAS transmission procedures, resume normal programming until receipt of the cue from the SR or LP sources in your Local Area. At that time begin transmitting the common emergency message received from the above sources.

(6) Resume normal operations upon conclusion of the message.

(7) The times of the above EAS actions must be entered in the broadcast station or cable system records as specified in § 11.54(b)(15) of this part. FCC Form 201 may be used to report EAS activations.

(8) Use of the EAS codes or Attention Signal automatically grants rebroadcast authority as specified in § 11.54(d) of this part.

Subpart E - Tests

§ 11.61 Tests of EAS procedures.

(a) Tests shall be made at regular intervals as indicated below. Additional tests may be performed anytime. EAS activations and special tests may be performed in lieu of required tests as specified in paragraph (a)(6) of this section. All tests will conform with the procedures in the EAS Operating Handbook.

(1) Required Monthly Tests of the EAS header codes, Attention Signal, Test Script and EOM code.

(i) Effective July 1, 1996, AM, FM and TV stations.

(ii) Effective July 1, 1997, cable systems.

(iii) Tests in odd numbered months shall occur between 8:30 a.m. and local sunset. Tests in even numbered months shall occur between local sunset and 8:30 a.m. They will originate from Local or State Primary sources. Time and script content will be developed by State Emergency Communications Committees in cooperation with affected broadcast stations, cable systems, and other participants. Script content can be in the primary language of the broadcast station or cable system. These monthly tests must be transmitted within 15 minutes of receipt by broadcast stations and cable systems in an EAS Local Area or State. Class D non-commercial educational FM and LPTV stations need to transmit only the test script.

(2) Required Weekly Tests:

(i) Attention Signal. Until July 1, 1996, broadcast stations must conduct tests of the Attention Signal and Test Script at least once a week at random days and times between 8:30 a.m. and local sunset. Class D non-commercial educational FM and LPTV stations do not need to transmit the Attention Signal. Script content can be in the primary language of the station.

(ii) EAS Header Codes and EOM Codes:

(A) Effective July 1, 1996, AM, FM and TV stations must conduct tests of the EAS header and EOM codes at least once a week at random days and times.

(B) Effective July 1, 1997, subject cable systems must conduct tests of the EAS header and EOM codes at least once a week at random days and times.

(iii) Class D non-commercial educational FM and LPTV stations are not required to transmit this test but must log receipt.

(iv) The EAS weekly test is not required during the week that a monthly test is conducted.

(3) Periodic Wire Service Tests. AP, Reuters and UPI shall separately conduct test transmissions to broadcast stations and cable systems on their wire networks. Tests may occur no more than once a month at random times selected by the wire services. These tests shall conform with the procedures in the EAS Operating Handbook and the National Control Point Procedures.

(4) Weekly Emergency Action Notification (EAN) network transmissions. Tests of the National level interconnection facilities shall be conducted on a random basis once each week. They shall originate from the Federal government over a dedicated network to specified control points of the radio and television networks, cable networks and program suppliers, wire services, common carriers and other organizations. The tests shall conform with the National Control Point Procedures.

(5) Periodic National Tests. National Primary (NP) sources shall participate in tests as appropriate. The FCC may request a report of these tests.

(6) EAS activations and special tests. The EAS may be activated at the State or Local Area level by a broadcast station or cable system in lieu of the monthly or weekly tests required by this section. Such activation must include transmission of the EAS header codes, Attention Signal, emergency message and EOM code for substitution of the monthly test. Activation must

include transmission of the Attention Signal and emergency message for substitution of the weekly test in paragraph (2)(i) of this section. Activation must include transmission of the EAS header and EOM codes for substitution of the weekly test in paragraph (2)(ii) of this section. Television stations and cable systems shall comply with the visual message requirements in § 11.51 of this part. Special EAS tests at the State and Local Area levels may be conducted on a day-to-day basis following procedures in State and Local Area EAS plans.

(b) Entries shall be made in the broadcast station or cable system records as specified in § 11.54(b)(14) of this part concerning EAS tests received and transmitted.

§ 11.62 Closed Circuit Tests of National Level EAS facilities.

(a) Closed Circuit Tests (CCT) of National Level EAS facilities shall be conducted on a random or scheduled basis not more than once a month and not less than once every three months. Test times will be selected by the White House in coordination with participating industry personnel, the Federal Emergency Management Agency (FEMA), and the FCC. The FCC will notify the participating networks, wire services, cable networks and program suppliers and common carriers of the selected time window for the test at least four working days (holidays excluded) before the test.

(b) The EAS Operating Handbook and National Control Point Procedures contain the CCT procedures.

(c) The control points of the participating radio and television networks, cable networks and program suppliers, wire services and common carriers will receive notification of a CCT by a "Closed Circuit Test Activation Message".

(d) Test announcements will originate from a point selected by the White House with program feed circuitry connected to the telephone company Toll Test Center at points coordinated for each test. Participating common carriers will connect, as required, the facilities of the radio networks and other test participants. Telephone companies are not authorized to add any participating independent broadcast stations unless authorized by the FCC. Authentication will be provided to the Toll Test Center or other program entry location responsible for test arrangements. Authentication used in the CCT Message will be the test words on the outside of the Red Envelope Authenticator List.

(e) CCT procedures for radio network affiliates, wire service subscribers, and, if participating, television network affiliates and cable systems are as follows:

(1) Notification of a CCT will be disseminated as specified in § 11.53(a)(1) and (a)(3) of this part and the EAS Operating Handbook.

(2) Recipients immediately monitor their radio network, and if participating, their television network or cable system, and check their wire service for the receipt of the CCT Activation Message. Verify authenticity using the current Red Authenticator List.

(3) Continue to monitor for the CCT audio talkup and program.

(4) Enter the time of receipt of the CCT message in the broadcast station log or cable system records.

(5) The CCT terminates on the following aural closing cue in the text of the test program: "This concludes the Closed Circuit Test of the EAS."

(6) Following the closing cue, wire service subscribers will receive a "Closed Circuit Test Termination Message". Record the time of receipt as indicated above.

(f) The FCC may request a CCT report in a prescribed format.

PART 73--RADIO BROADCAST SERVICES

7. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334.

8. Part 73 is amended by removing Sections 73.901 through 73.962 in Subpart G, revising the heading and adding a cross reference to read as follows:

Subpart G -- Emergency Broadcast System

The Emergency Broadcast System (EBS) rules have been renamed the Emergency Alert System (EAS) and revised. The new EAS rules are contained in a new Part 11. Equipment type accepted for EBS use under the old Subpart G rules may continue to be used at broadcast stations until July 1, 1996, provide that it meets all applicable requirements of Part 11.

CROSS REFERENCE

§ 73.901 is amended and renumbered § 11.1
§ 73.902 is amended and renumbered § 11.1
§ 73.903 is amended and renumbered § 11.11
§ 73.904 is deleted
§ 73.905 is amended and renumbered § 11.13
§ 73.906 is amended and renumbered § 11.12
§ 73.907 is amended and merged into § 11.13
§ 73.908 is amended and renumbered § 11.15
§ 73.909 is amended and renumbered § 11.16
§ 73.910 is amended and renumbered § 11.17
§ 73.912 is amended and renumbered § 11.43
§ 73.913 is amended and renumbered § 11.18
§ 73.914 is amended and renumbered § 11.19
§ 73.915 is amended and merged into § 11.19
§ 73.916 is amended and merged into § 11.19
§ 73.917 is amended and merged into § 11.19
§ 73.918 is amended and merged into § 11.19
§ 73.919 is amended and renumbered § 11.20
§ 73.920 is amended and merged into § 11.21(b)
§ 73.921 is amended and renumbered § 11.21

§ 73.922 is amended and merged into § 11.44
§ 73.926 is amended and renumbered § 11.41
§ 73.927 is amended and merged into § 11.42
§ 73.931 is amended and divided into § 11.53 and § 11.14
§ 73.932 is amended and divided into § 11.35, § 11.51 and § 11.52
§ 73.933 is amended and renumbered § 11.54
§ 73.935 is amended and renumbered § 11.55
§ 73.936 is amended and merged into § 11.55
§ 73.937 is amended and merged into § 11.55
§ 73.940 is amended and renumbered § 11.32
§ 73.941 is amended and renumbered § 11.33
§ 73.942 is amended and renumbered § 11.34
§ 73.943 is amended and merged into § 11.34
§ 73.961 is amended and renumbered § 11.61
§ 73.962 is amended and renumbered § 11.62
§§ 11.31, 11.45 and 11.46 are added

* * * * *

9. Section 73.1207 is amended by revising paragraph (b)(1) and adding a new paragraph (c)(4) to read as follows:

§ 73.1207 Rebroadcasts.

* * * * *

(b) * * *

(1) Stations originating emergency communications under a State EAS plan are considered to have conferred rebroadcast authority to other participating stations.

* * * * *

(c) * * *

(4) Emergency communications originated under a State EAS plan.

* * * * *

10. Section 73.1250 is amended by revising paragraph (c) and revising the last sentence of paragraph (h) to read as follows:

§ 73.1250 Broadcasting emergency information.

* * * * *

(c) If the Emergency Alert System (EAS) is activated for a national emergency while a Local Area or State emergency operation is in progress, the national level EAS operation must take precedence. If, during the broadcasting of Local Area or State emergency information, the EAS codes or Attention Signal described in § 11.12 of this chapter are used, the broadcasts are considered as being carried out under a Local Area or State EAS plan.

* * * * *

(h) * * * However, when an emergency operation is being conducted under a national, State or Local Area Emergency Alert System (EAS) plan, emergency information shall be transmitted

both aurally and visually unless only the EAS codes are transmitted as specified in § 11.51 of this chapter.

11. Section 73.1820 is amended by revising paragraph (a)(1)(iii) to read as follows.

§ 73.1820 Station log.

(a) * * *
(1) * * *
(iii) An entry of each test and activation of the Emergency Alert System (EAS) pursuant to the requirement of part 11 of this chapter and the EAS Operating Handbook. Stations may keep EAS data in a special EAS log which shall be maintained at a convenient location; however, this log is considered a part of the station log.

* * * * *

12. Section 73.3549 is amended by revising the heading and the first sentence to read as follows.

§ 73.3549 Requests for extension of authority to operate without required monitors, indicating instruments, and EAS encoders and decoders.

Requests for extension of authority to operate without required monitors, transmission system indicating instruments, or encoders and decoders for monitoring and generating the EAS codes and Attention Signal should be made to the Engineer in Charge of the Field Office in which the station is operating. * * *

* * * * *

13. Section 73.4097 is amended by revising the heading to read as follows:

§ 73.4097 EBS (now EAS) attention signals on automated programming systems.

* * * * *

14. The alphabetical index following Part 73 is amended by replacing the entries for EBS with the following:

ALPHABETICAL INDEX-PART 73

* * * * *

E

* * * * *

EAS (Emergency Alert System).....11.1-11.62

EAS signal tests-automated systems.....73.4097(*)
* * *
Emergency Alert System (EAS).....11.1-11.62

PART 76--CABLE TELEVISION SERVICE

15. The authority Citation for Part 76 continues to read:

AUTHORITY: Sec. 2, 3, 4, 301, 303., 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309; 532; 533; 535; 542; 543; 552; 554, as amended, 106 Stat. 1460.

16. Section 76.3 is amended by adding a new entry in numerical order to read as follows:

§ 76.3 Other pertinent rules.

* * * * *
Part 11-Emergency Alert System (EAS)
* * * * *

* * * * *

17. Section 76.5 is amended by adding a new paragraph (qq) to read as follows:

§ 76.5 Definitions.

* * * * *

(qq) Emergency Alert System (EAS). The EAS is composed of broadcast networks; cable networks and program suppliers; AM, FM and TV broadcast stations; Low Power TV (LPTV) stations; subject cable systems; and other entities and industries operating on an organized basis during emergencies at the National, State, or local levels.

18. Section 76.301 is revised to read as follows:.

§ 76.301 Copies of rules.

The operator of a cable television system shall have a current copy of Part 76 and, if subject to the Emergency Alert System (EAS) rules contained in Part 11, an EAS Operating Handbook, and is expected to be familiar with the rules governing cable television systems and the EAS. Copies of the Commission's Rules may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402, at nominal cost. Copies of the EAS Operating Handbook may be obtained from the Commission's EAS staff, in Washington, DC.

19. Section 76.305 is amended by adding a new paragraph

(a)(1) to read as follows.

§ 76.305 Records to be maintained locally by cable system operators for public inspection.

(a) * * *

(1) A record shall be kept of each test and activation of the Emergency Alert System (EAS) procedures pursuant to the requirement of part 11 of this chapter and the EAS Operating Handbook. These records shall be kept for three years.

* * * * *

APPENDIX F

GLOSSARY OF TERMS

Activation -
the initiation of the EAS by transmission of the EAS codes

ASCII -
a standard set of text characters with numerical equivalents

Attention Signal -
eight seconds of two tones (853 and 960 Hz) used as an audio alert

Audio Frequency Shift Keying (AFSK) -
a digital modulation technique that uses two shifting audio frequencies to transmit binary data

Authenticator Word Lists -
a list of words that federal officials send prior to official EAS national activation; used to substantiate the information being sent

Authorization -
the official authorization, given by FCC, for a broadcast station to go off the air during a national level activation of the EAS

Automatic Interruption -
the automatic encoding and transmission of EAS codes for preselected events

Baud Rate -
the speed of data transmitted, equal to number of elements sent per second (equal to bits per second if a bit is the element)

Bit Rate -
the speed of binary data transmitted, equal to the number of digital bits sent per second

Certification -
an equipment authorization issued by the FCC based on representations and test data submitted by the applicant for equipment designated to be operated without individual license under Parts 15 and 18 of the rules

Class D FM station -
a station whose output power is 10 Watts or less

Closed Circuit Test (CCT) -

a test of the EAN network from FEMA to the EAN program participants, and ending at the facilities of the EAN participants' affiliates

Direct Broadcast Satellite (DBS) -
a service intended to deliver satellite signals directly to consumers using small, relatively inexpensive receive stations

Decoder (EAS) -
an electronic device used by EAS participants to receive EAS alerts and to translate the EAS codes into a visual message

Decoder (Two-Tone) -
an electronic device that alerts operators to the reception of the two-tone signal

EAN network -
the interconnection of the Federal Government with national networks and program suppliers used to disseminate the EAN messages

Emergency Action Notification (EAN) -
the message for national EAS activation

Emergency Action Termination (EAT) -
the message for national EAS termination

Encoder (EAS) -
an electronic device used by EAS participants to originate EAS alerts by creating the EAS codes for transmission to other participants and the public

Encoder (Two-Tone) -
an electronic device that produces the two-tone signal

EOM Code -
in ASCII form 'NNNN', this burst of data, sent three times signifies the end of an EAS message and EAS activation

Event Code -
a three character ASCII code in the EAS headers that denotes the type or cause of emergency event

Federal Emergency Management Agency (FEMA) -
one of the three federal agencies that administer EAS

FIPS Number -
a five character ASCII code in the EAS headers that represent those counties affected by an EAS activation, as defined by the Federal Information Processing System that

assigns each state and territory with their respective counties a five digit number

Header Code -
a single string of intelligent digital EAS ASCII data that includes the originator, event, location, time period, and other basic information concerning an emergency; three header codes precede the voice warning message

Julian Calendar -
a method of specifying the date by the number of days which have passed since the first day of January in a year

Key Source -
a source which is central to the dissemination of emergency alerts and information, such as an NP, SP, SR, or LP broadcast station

Local Primary (LP) -
a key source within a local area that is the primary source of EAS programming for that local area

Location Code -
an ASCII code in an EAS header that specifies the location of an emergency utilizing the five character FIPS code of a state and county, and a sixth character to designate nine divisions of a county

Low Power Television (LPTV) -
a television signal translator station which also originates programming

Mapbook -
a list of broadcast and cable systems and their EAS designation delineated by state and local area for use by other stations to determine the best source of EAS monitoring; an FCC generated attachment to every state plan

Mark Frequency -
the audio frequency of AFSK modulation that corresponds to a digital bit of one (1); the mark frequency of EAS codes is 6250/3 Hz, or approximately 2083.33 Hz

Monitoring Assignment -
the off-air broadcast or cable sources of EAS activations and programming as given in the FCC Mapbook and the state plans

National Control Point Procedures -
those national EAS procedures used only by national networks and program suppliers

National Information Center (NIC) -
a source of official federal government information

National Oceanic and Atmospheric Administration (NOAA) -
one of the three federal agencies that participate in EAS

National Periodic Test (NPT) -
tests of National Primary sources

National Primary (NP) -
a primary source of Presidential or other national EAS activations and programming, including broadcast stations involved with the PEP system and EAN Networks

National Weather Service (NWS) -
an operation of NOAA that is directly responsible for issuing local weather-related emergency alerts and warnings in addition to day-to-day forecasts and other weather activities

NOAA Weather Radio (NWR) -
a service of the National Weather Service that provides to a local area continuous broadcasts of the latest weather information and any weather-related emergency warnings using one of seven VHF radio channels

Non-participating National (NN) -
an EAS source (usually a broadcast station) that has elected not to participate in the National-level EAS and removes its carrier from the air if a national-level activation occurs

Operating Handbook -
a document issued by the FCC that instructs broadcast station and cable personnel of the actions they must take during an activation of EAS

Operator Interruption -
the transmission of an EAS activation which has been manually initiated by broadcast station or cable system personnel

Originator Code -
a three character ASCII code in an EAS header which denotes the source of an activation

Participating National (PN) -
broadcast stations, cable systems, or MDS stations which monitor primary sources of EAS programming and directly feed emergency alerts to the public

Preselected code -
an EAS event which the operator of EAS equipment has chosen to be automatically encoded and retransmitted upon reception

Primary Entry Point (PEP) -
key broadcast stations throughout the U.S. which together can provide national emergency information in the event that the primary national alerting methods are inoperable

Protocol -
a standard set of guidelines by which digital information is encoded and decoded, including the common code structure, the character set used, the sequence and timing of codes, and modulation technique used for radio transmission

Program Priorities -
the precedence of the information that must be transmitted during an EAS activation, namely national, local, and state activations in that order

Radio Broadcast Data System (RBDS) -
a defined protocol for data that is transmitted on the 57 kHz subcarrier of FM radio broadcast stations utilized mainly by consumer devices equipped to receive it

Required Monthly Test (RMT) -
a coordinated monthly test of EAS operations involving the full receiving and transmission of EAS codes, Attention Signal, EAS test programming, and EAS EOM codes

Required Weekly Test (RWT) -
an independent weekly test of EAS equipment only involving the decoding and encoding of EAS header codes and EOM codes

RS-232 -
a common interface standard which specifies the mechanical connection, electrical signals, and the function of the signals carried across the interface

Space Frequency -
the audio frequency of AFSK modulation that corresponds to a digital bit of zero (0); the space frequency of EAS codes is 6250/4 Hz, or 1562.5 Hz

State/Local Plan -
a document that details monitoring assignments, actions to be taken in emergency activations, and other guidance for broadcasters and cable personnel in use of the EAS

State Primary (SP) -
a primary source of EAS state programming which can originate with a Governor or designated representative, such as a state's emergency operations officer

State Relay (SR) -
an entity which receives and retransmits EAS activations in a State Relay Network to assist in bringing a state activation to all Local Areas of a state

State Relay Network -
a system of facilities used to distribute State EAS activations and programming across a state

Subcarrier -
an inaudible portion of the broadcast signal that is added to the program signal of the FM or TV sound and these can include the FM 57 kHz, 67 kHz, 69 kHz, and 92 kHz and the TV Subsidiary Communications Services

Subsidiary Communications Services -
a subcarrier of television and FM stations providing a second audio programming source

Type Acceptance -
an equipment authorization issued by the FCC based on test data submitted by the applicant for equipment to be used pursuant to a station authorization

UTC -
Coordinated Universal Time, the world-wide common time standard that is used in EAS headers for time stamp

Valid Code -
an EAS header which has been matched bit-for-bit with one of two other received headers thereby checked for validity

WRSAME -
Weather Radio Specific Area Message Encoder, a device used by National Weather Service to broadcast WRSAME data on the National Weather Radio for day-to-day forecasts and weather-related emergency announcements

APPENDIX G

EAS TIMETABLE

TIMETABLE

BROADCAST STATIONS

Requirement	11/10/94	7/1/95	7/1/96	7/1/97
Two-tone encoder timing 1/	20-25 seconds	8-25 seconds	8-25 seconds	8-25 seconds
Two-tone decoder timing	Begin changing timing from 8-16 to 3-4 sec.	All decoders at 3-4 sec.	3-4 sec.	Two-tone decoders no longer used
EAS decoder and encoder	Use is optional	Use is optional	Use as required	Use as required

CABLE SYSTEMS

Requirement	Before 7/1/97	7/1/97 2/
Two-tone signal from storage device 1/	Use is optional, 8-25 seconds	Use as required, 8-25 seconds
EAS decoder and encoder	Use is optional	Use as required 2/

1/ Two-tone signal used only to provide audio alert to audience before EAS emergency messages and required monthly test.

2/ On this date, cable systems shall provide: (1) a video message on all channels or other alerting techniques to hearing impaired and deaf subscribers, (2) an audio message and video interruption on all channels, and (3) a video message on at least one channel to all subscribers.

NOTE: Class D FM and low power TV stations are not required to have two-tone or EAS encoders. LPTV stations that operate as television broadcast translator stations are exempt from the requirement to have EAS equipment.

APPENDIX G

EAS REQUIREMENTS

REQUIREMENTS

BROADCAST STATIONS

Requirement	AM	FM	FM Class D	TV	LPTV 1/
Two-tone decoder (until 7/1/97)	Y	Y	Y	Y	Y
Two-tone encoder	Y	Y	N	Y	N
EAS decoder (7/1/96)	Y	Y	Y	Y	Y
EAS encoder (7/1/96)	Y	Y	N	Y	N
Audio message (7/1/96)	Y	Y	Y	Y	Y
Video message (7/1/96)				Y	Y

CABLE SYSTEMS

Requirement	
Two-tone decoder	N
Two-tone encoder	N
EAS decoder (7/1/97)	Y
EAS encoder (7/1/97)	Y
Audio message on all channels (7/1/97)	Y 2/
Video interruption on all channels, video message on one channel (7/1/97)	Y 3/

1/ LPTV stations that operate as television broadcast translator stations are exempt from the requirement to have EAS equipment.
2/ Shall transmit two-tone signal, but it may be from a storage device.
3/ Shall provide video on all channels or other alerting techniques to certified hearing impaired and deaf subscribers.

APPENDIX G

EAS REQUIREMENTS

AS PROPOSED FOR MDS SYSTEMS

Requirement	
Two-tone decoder	N
Two-tone encoder	N 1/
EAS decoder (1/1/01)	Y
EAS encoder (1/1/01	N
Audio message on all channels (1/1/01)	Y 1/
Video interruption on all channels, video message on one channel (1/1/01)	Y 2/

1/ Shall transmit two-tone signal, but it may be from a storage device.
2/ Shall provide video on all channels or other alerting techniques to certified hearing impaired and deaf subscribers.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94-287
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	MM Docket No. 92-265
and Competition Act of 1992	)	
	)	
Development of Competition and	)	
Diversity in Video Programming	)	
Distribution and Carriage	)	

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER

Adopted: November 10, 1994 Released: December 9, 1994

By the Commission: Commissioner Barrett issuing a statement.

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Appendix A: Parties Filing Comments
Appendix B: Final Rule Changes

I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[1] The 1992 Cable Act amended the Communications Act of 1934, in part, by adding, among other things, new Section 628. Section 628 is intended to foster the development of competition to traditional cable systems by governing the access by competing multichannel systems to cable programming services. Section 628(b) prohibits "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent" competing distributors from providing programming to their customers.[2] Section 628(c) instructs the Commission to adopt regulations to specify particular conduct that is prohibited by subsection (b).[3] Pursuant to that mandate, on April 1, 1993, the Commission adopted its *First Report and Order*, which set forth the Commission's program access rules and procedures to implement these statutory provisions.[4]

2. The Commission has received various petitions for reconsideration of the *First Report and Order*. A list of petitioners and commenters is at Appendix B. In this *Memorandum Opinion and Order* ("MO&O"), we dispose of those issues raised for reconsideration. Specifically, in this MO&O, we affirm our initial determinations that (i) a showing of harm is not required for actions brought under Section 628(c); (ii) differences in costs at the programming distributor's level cannot justify pricing differences by a satellite

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 47 U.S.C. § 548(b).

[3] 47 U.S.C. § 548(c).

[4] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992-- Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket 92-265, 8 FCC Rcd 3359 (1993) (*"First Report & Order"*).

cable or broadcast programming vendor in the sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors; (iii) the Commission's rules apply to contracts that were in existence before the effective date of the rules[5]; and (iv) the five percent attribution standard should be used to assess the existence of vertical integration.

3. In addition, in this MO&O, we grant certain petitions to the extent they request the Commission: (i) to extend the existing confidentiality protection in the rules to proprietary materials exchanged during the pre-complaint negotiation period required under the rules; (ii) to permit a party to seek permission from the Commission to further restrict an opposing party's access to proprietary information; (iii) to amend the rules on subdistribution arrangements in areas unserved by cable to clarify that nonexclusive subdistribution agreements in both served and unserved areas are treated the same and subject to the protection provided by the rules; (iv) to clarify the rules regarding the financial liability of buying groups, and (v) to determine that, once a programming vendor has shown the Commission that a "similarly-situated" competitor is the proper focus for comparison in justifying price differentials between distributors, a "similarly-situated" competitor also is the proper focus to justify a *de minimis* differential.

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[5] Three additional petitions were filed that relate to the effective date of the program access rules. The issues raised in those petitions are now moot. Specifically, WJB-TV Ft. Pierce Limited Partnership ("WJB") filed a petition contending that the program access rules against exclusive contracts should be deemed effective immediately upon the enactment of the 1992 Cable Act (December 4, 1992) or on the effective date of the Commission's program access rules (July 16, 1993) in contrast to delaying the effective date of the rules until the end of the 120 day renegotiation period that was provided for under the rules. Because the rules are now effective, the issue raised by WJB is moot. The Wireless Cable Association, Inc. ("WCA") filed a Request for Clarification that the Commission specify a specific date before which any party intending to enforce an existing exclusive programming agreement must file an exclusivity petition. WCA contended that the 120-day renegotiation period before the program access rules became effective applies only to discrimination barred by the rules and not exclusive agreements. Because all existing contracts must be in compliance with the rules, WCA's request is moot. Finally, Discovery Communications, Inc. ("Discovery") and Viacom International, Inc.("Viacom") filed petitions contending that distributors seeking to revise existing contracts should be required to demonstrate that the current contract terms have the purpose or effect to harm the distributor's ability to compete. Discovery contended that under this proposal only the contracts that create a potential for harm will need to be reformed, while other agreements can be brought into strict compliance with the rules as they come up for renewal, thereby avoiding administrative upheavals to programmers. The November 15, 1993 deadline by which all contracts were required to come into compliance with the Act and our rules has now passed and thus these issues are moot.

4. In addition, the Commission determines that it does have the authority under Section 628 to award damages for violations of the program access rules, but determines that creating such a remedy for violations of the program access rules is not necessary at this time. If, contrary to our expectations, it is brought to the Commission's attention that the current process for resolving complaints is not working, the Commission will consider revisiting this issue. Finally, the Commission denies the petition submitted by the Caribbean Satellite Network ("CSN") on the ground that the Commission already considered CSN's comments both in the *First Report and Order* and in the *Second Report and Order.*[6] This MO&O also emphasizes certain procedural requirements for all types of program access complaints and clarifies the discussion in the *First Report and Order* of those procedural requirements.

5. In addition to the petitions discussed in this MO&O, the National Rural Telecommunications Cooperative ("NRTC") also filed a petition for reconsideration challenging the Commission's interpretation of 47 U.S.C. Section 548(c)(2)(C) governing the permissibility of exclusive contracts in areas unserved by cable operators. This issue will be the subject of a separate *Memorandum Opinion and Order*.

II. DAMAGES

6. *Background*. Under the program access provisions of the 1992 Cable Act, alleged violations of Section 628(b) or the Commission's rules implementing Section 628(c) are adjudicated before the Commission.[7] In Section 628(e)(1), Congress granted the

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[6] The Caribbean Satellite Network, Inc. ("CSN") petitioned the Commission to amend the *First Report and Order* on the ground that CSN was not listed as a commenter in the *First Report and Order* and, thus, its comments were not considered. The late comments of CSN were considered by the Commission and noted in the *First Report and Order* (8 FCC Rcd at 3451 n.91) and in the *Second Report and Order* in *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992--Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265 (Oct. 22, 1993), 9 FCC Rcd 2642 (1993) (*"Second Report and Order"*). The majority of CSN's comments did not address implementation of Section 19 of the 1992 Cable Act, the issues addressed in the *First Report and Order*, but rather involved issues relating to Section 12 that were addressed in the *Second Report and Order*. Thus, the Commission appropriately discussed CSN's comments in the *Second Report and Order*. CSN's petition is therefore denied.

[7] 628(d) provides:"[a]ny multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of subsection (b), or the regulation of the Commission under subsection (c), may commence an adjudicatory proceeding at the Commission." 47 U.S.C. § 548(d).

Commission the authority, upon completion of such adjudication, "to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor."[8] Section 628(e)(2) further states that "the remedies in paragraph (1) are in addition to and not in lieu of the remedies available under Title V or any other provisions of this Act."[9] (emphasis added)

7. In the *First Report and Order*, the Commission stated that with respect to prohibited exclusive agreements:

> we may order the vendor to make its programming available to the complainant on the same terms and conditions, and at a non-discriminatory rate, as given to the cable operator. In addition, we may impose sanctions available under Title V of the Communications Act. We do not believe, however, that the 1992 Cable Act grants the Commission the authority to assess damages against the programmer or cable operator.[10]

The Commission further stated that in most price discrimination cases:

> the appropriate remedy will be to order the vendor to revise its contract or offer to the complainant a price or contract term in accordance with the Commission's findings. However,...the statute provides broad authority to the Commission to order additional remedies or impose sanctions for violations of Section 628, which will be used in appropriate circumstances.[11]

8. NRTC[12] petitioned the Commission to reconsider its prior determination that the Commission is not authorized to award damages to an aggrieved multichannel video programming distributor ("MVPD") for a violation of the program access rules.[13] NRTC

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[8] 47 U.S.C. § 548(e)(1).

[9] 47 U.S.C. § 548(e)(2).

[10] 8 FCC Rcd at 3392.

[11] *Id.* at 3420.

[12] Petition For Reconsideration of the National Rural Telecommunications Cooperative, June 10, 1993 ("NRTC Petition"). NRTC and its members are multichannel video programming distributors which distribute programming packages to Home Satellite Dish ("HSD") subscribers and Direct Broadcast Satellite ("DBS") services to subscribers in rural areas. NRTC Petition at 2-3.

[13] *Id.* at 5, 9.

argued that Section 628(e) provides a broad grant of authority to award appropriate remedies[14] and that the Commission's determination that the 1992 Cable Act does not grant authority to award damages has unnecessarily restricted the Commission's authority under the 1992 Cable Act to order appropriate remedies, including damages, for violation of the program access rules.[15]

9. NRTC further argued that "[d]amages are traditionally regarded as an 'appropriate remedy' imposed by the Commission for violation of its nondiscrimination requirements."[16] As support, NRTC cited to other sections of the Communications Act, including Section 202 (prohibition against certain unjust or unreasonable discrimination by common carriers); Section 206 (subjecting a common carrier to liability to any person injured as a result of unjust or unreasonable discrimination for the full amount of damages sustained, together with reasonable counsel fees); Section 207 (allowing any person unjustly or unreasonably discriminated against by any common carrier to make a complaint to the Commission); and Section 209 (authorizing the Commission to award damages for unjust or unreasonable discrimination by a common carrier).[17] NRTC argued that "the Commission should reserve the same type of discretion to award damages to an aggrieved MVPD for unlawful discrimination in the provision of programming."[18]

10. NRTC also contended that damages are necessary because forfeitures alone will be an inadequate deterrent to anticompetitive conduct[19] and that "[w]ithout the possibility of an appropriate award of damages, program vendors have no incentive to discontinue their discriminatory pricing practices, and will be motivated to prolong complaint proceedings.[20] NRTC stated that some programming vendors have indicated to NRTC that they do not intend to comply with the Commission's rules.[21]

11. The Bell Atlantic Telephone Companies ("Bell Atlantic") and Consumer Federation of America ("CFA") filed comments in support of NRTC's petition, and argued

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[14] *Id.* at 4.

[15] *Id.* at 5.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 6.

[19] *Id.* at 6-7.

[20] *Id.* at 7.

[21] *Id.* at 8.

that Section 628(e) provides a broad grant of authority to award appropriate remedies.[22] Bell Atlantic argued that damages are authorized because Section 628(e) expressly gives the Commission the authority "to grant all other remedies provided for under 'any other provisions of this Act', and that those 'other provisions' of the Communications Act expressly provide for the recovery of damages."[23] In addition, Bell Atlantic and CFA contended that an award of damages would further the public interest by deterring the anticompetitive conduct that the program access provisions of the 1992 Cable Act sought to end.[24]

12. Several programming vendors and cable operators opposed NRTC's petition asserting various arguments against an interpretation of the statute that would authorize the Commission to award damages for violations of the program access rules. First, while several commenters conceded that Section 628(e) provides a broad grant of authority to award appropriate remedies, they nonetheless argued that it does not authorize damages as a remedy.[25] For example, Discovery argued that Section 628 contains no explicit reference to damages, so the Commission should not impose a punitive remedy by virtue of a general authority to fashion an appropriate remedy.[26] Second, various commenters contended that, if Congress intended to authorize the Commission to award damages in program access cases, Congress could have, but did not, expressly incorporate by reference the remedies available under Title II.[27]

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[22] Comments of Bell Atlantic on Petitions For Reconsideration, July 14, 1993 ("Bell Atlantic Comments") at 11; Letter from Bradley Stillman, Legislative Counsel of Consumer Federation of America, dated July 8, 1993 ("CFA Letter") at 1.

[23] Bell Atlantic Comments at 11-12 (citing 47 U.S.C. §§ 207, 209); Reply of Bell Atlantic to Petitions For Reconsideration ("Bell Atlantic Reply") at 4-5.

[24] Bell Atlantic Comments at 11-12; CFA Letter at 1.

[25] Opposition To Petition For Reconsideration by Discovery Communications, Inc., July 14, 1993 ("Discovery Opposition") at 1-5; Liberty Media Corporation's Opposition To The National Rural Telecommunications Cooperative's Petition For Reconsideration, July 14, 1993 ("Liberty Media Opposition") at 4-7; Opposition of Superstar Connection To Petition For Reconsideration, July 14, 1993 ("Superstar Opposition") at 12-14; Opposition of Time Warner Entertainment Company, L.P., To Petitions For Reconsideration or Clarification, July 14, 1993 ("Time Warner Opposition) at 5-6; Opposition of United Video, Inc., July 14, 1993 ("United Video Opposition") at 2-3; Opposition To Petition For Reconsideration of Viacom International, Inc., July 14, 1993 ("Viacom Opposition") at 13-14; Reply of Landmark Communications, Inc. To Oppositions, July 26, 1993 ("Landmark Reply") at 5-6.

[26] *Id.*

[27] Viacom Opposition at 14; Liberty Media Opposition at 6; Discovery Opposition at 3.

13. Third, commenters contended that the remedies provided under Title II of the Communications Act are not available to aggrieved multichannel video programming distributors ("MVPDs") under the program access rules because Title II only applies to common carriers' conduct.[28] These petitioners contended that, because cable operators and programming vendors are not common carriers, the damages authorized under Section 209 in Title II are not available under Section 628(e).[29] Superstar also contended that petitioner's reliance on Title II is misplaced because of the difficulty in assessing damages under Section 19. Superstar noted that "the actual measure of damages in common carrier proceedings is limited to the particular profits which are lost due to customers subscribing to a competitor's service," and that, in contrast, NRTC wants the distributor to be able to recover unfair payments of discriminatory rates.[30] Moreover, Superstar contended that it would be speculative to assume that the price of programming charged to a distributor alone caused a customer not to subscribe to a particular technology and, thus, awarding damages, even as lost profits, would be speculative and not based on any business or market evidence.[31]

14. Fourth, commenters disputed NRTC's argument that absent the authority to award damages, the remedies available to the Commission are inadequate to deter anticompetitive conduct.[32] Commenters contended that the Commission's ability to impose sanctions provides sufficient incentive to comply with the rules.[33] Discovery and Liberty Media Corporation ("Liberty Media") contended that the Commission's streamlined procedure for handling complaints is sufficient to promote fair access to programming.[34] United Video, Inc. ("United Video") contended that the Commission's authority to establish "non-discriminatory prices for programming ... is a sufficient remedy" and that program vendors do not need additional incentives to comply with the program access regulations.[35]

15. In response to these oppositions, NRTC replied that damages must be awarded

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[28] Discovery Opposition at 3; Liberty Media Opposition at 4-5; Superstar Opposition at 12; Time Warner Opposition at 6 n. 6; Landmark Reply at 6.

[29] Superstar Opposition at 12; Time Warner Opposition at 6 n.6; Landmark Reply at 6.

[30] Superstar Opposition at 13.

[31] *Id.* at 13-14.

[32] Discovery Opposition at 3; Liberty Media Opposition at 7-8; Time Warner Opposition at 6; United Video Opposition at 2-3; Landmark Reply Comments at 6-7.

[33] Liberty Media Opposition at 7-8; Time Warner Opposition at 6; Landmark Reply at 7.

[34] *Id.* at 4; Liberty Media Opposition at 7.

[35] United Video Opposition at 2.

to make an aggrieved party whole and that awarding damages is within the Commission's discretion.[36] NRTC stated that it does not contend that Title II and Section 628 are the same, but that "Title II is just one *example* of an area where the Commission in the past has ordered damages as an 'appropriate remedy.'"[37] Bell Atlantic also replied to the oppositions, arguing, *inter alia,* that, by "incorporating remedies that would be available under other provisions of the Act, Congress expressly authorized damages for program access complaints."[38]

16. *Discussion.* In the *First Report and Order*,[39] the Commission stated that it would prohibit the enforceability of a prohibited exclusivity arrangement and require the programming vendor to make its programming available on the same terms and conditions as given to cable operators. The Commission also stated that, in addition to ordering such relief, it could impose sanctions under Title V of the Act (e.g., forfeitures). The Commission stated that it did not believe that the 1992 Cable Act provided it with authority to assess damages against a cable operator or programming vendor.

17. In response to NRTC's petition for reconsideration, we have reexamined the statute and legislative history, and we now conclude that Section 628(e) provides the Commission with broad authority to order appropriate remedies. In our judgment, this authority is broad enough to include any remedy the Commission reasonably deems appropriate, including damages.[40] Although petitioners are correct that the statute does not expressly use the term "damages," it does expressly empower the Commission to order "appropriate remedies." Because the statute does not limit the Commission's authority to determine what is an appropriate remedy, and damages are clearly a form of remedy,[41] the

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[36] NRTC Reply at 7.

[37] *Id.* at 8.

[38] Bell Atlantic Reply at 4-5.

[39] *First Report and Order,* 8 FCC Rcd at 3392

[40] We do not believe that the cases of *Karahalios v. National Federation of Federal Employees, Local 1263*, 489 U.S. 527(1989), *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), and *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11 (1979), cited by Time Warner in its *ex parte* presentation of November 3, 1994, suggest otherwise. The basic issue in each of these cases was whether the statute or act in question implicitly created a "private cause of action" in federal court, particularly where Congress had provided specific remedies either at the administrative level or judicial level, or both. Here, Congress has expressly afforded the Commission the authority to order appropriate remedies and, thus, we find these cases inapplicable.

[41] *See* Black's Law Dictionary, Revised 4th Ed. (St. Paul, Minn. 1968)

plain language of this part of Section 628(e) is consistent with a finding that the Commission has authority to afford relief in the form of damages. The legislative history is to the same effect.[42]

18. While we have determined that the statute's grant of power to the Commission to award appropriate remedies is broad enough to include damages, we are not persuaded by petitioners' arguments that creating such a remedy for violations of the program access rules is necessary at this time. Instead, we believe that the sanctions available to the Commission, pursuant to Title V, together with the program access complaint process, are sufficient to deter entities from violating the program access rules. Our experience over the past year suggests that the program access provisions of the statute and our implementing regulations are successfully working to achieve Congress' goal of increasing competition to traditional cable systems by providing greater access by competing multichannel systems to cable programming services.[43] If, contrary to our expectations, it is brought to our attention that the current processes are not working, we will consider revisiting this issue.

III. ATTRIBUTION

19. *Background*. Section 628(b)[44] proscribes "a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor" from engaging in unfair practices." We stated in the *First Report and Order* that, "a principal target of the restrictions contained in Section 628 is the conduct of vertically integrated satellite cable programming vendors."[45]

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[42] In describing the House provision regarding program access, which was the basis for the version ultimately adopted, the Conference Committee stated, without any limitation, that the FCC "shall order appropriate remedies." H. Conf. Rep. No. 862, 102d Cong., 2d Sess 92 (1992).

[43] *See In the Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 94-48 (September 28, 1994) at ¶173. In this report, the Commission noted that the commenters in this proceeding have not complained about widespread unavailability of programming to distributors competing with cable operators. To the contrary, we noted that commenters indicated that the program access rules have facilitated increased competition in the video marketplace and that a relatively small number of complaints have been filed with the Commission concerning denial of access to programming on the grounds of exclusivity agreements.

[44] 47 U.S.C. § 548(b).

[45] *First Report and Order*, 8 FCC Rcd at 3369.

20. In assessing vertical integration, the Commission stated that it would "consider a cable operator to have an attributable interest in a programming vendor if the cable operator holds five percent or more of the stock of the programming vendor, whether voting or non-voting."[46] In deciding on this standard, we noted that:

> various attribution rules have been used by the Commission and by other regulatory agencies depending on the specific policy or rule in question, *e.g.*, whether control, influence or some other aspect of the relationship is involved, and on an evaluation of the costs and risks associated with various levels of ownership or influence. The policy objective involved here, we believe, warrants a relatively inclusive attribution rule.[47]

21. The Commission also noted that the attribution standard was consistent with the video dialtone standard [48] and that "the intent of the video dialtone proceeding is more analogous to the intent of Congress in adopting Section 628, i.e., to curb incentives for influencing behavior of affiliates to the detriment of competitors."[49] The Commission noted its concern "that a standard of more than five percent could allow cable operators to exert significant influence over their affiliated programmers without being subject to the statute."[50]

22. In adopting a five percent attribution test, the Commission rejected various commenters' proposals that we adopt a behavioral test for assessing attribution. We stated that:

> [t]o provide certainty to the cable industry and the public, it is imperative that we develop a clear directive with respect to which entities will be deemed subject to the statute and our implementing rules. A behavioral test is necessarily *ad hoc* and therefore would not provide sufficient certainty.[51]

23. The Commission also declined to adopt an exemption from our attribution standards for a programming vendor whose aggregate subscriber base from its affiliated cable owners represented less than five percent (or some small number) of its total program

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[46] *Id.* at 3370.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 3370-71 (citations omitted).

[51] *Id.* at 3371.

subscribership. We noted that "the record does not provide sufficient data to support a definitive point at which the incentives for such vendors to favor their affiliated customers differ from other vertically integrated programming vendors, but left open the possibility of revisiting this exemption "to the extent that parties are able to provide information regarding the incentives and past conduct of vendors with *de minimis* vertical interests."[52] The Commission also declined to adopt a more flexible attribution standard for minority-owned cable programming vendors, but noted that "we could revisit this attribution standard, to the extent that it is consistent with this section of the 1992 Cable Act, and would promote minority programming." [53]

24. Accordingly, the Commission promulgated § 76.1000(b),[54] which provides:

> For purposes of determining whether a party has an 'attributable interest' as used in this subpart, the definitions contained in the notes to § 76.501 [the broadcast attribution standard] shall be used, provided, however that:
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> (1) The single majority shareholder provisions of Note 2(b) to § 76.501 and the limited partner insulation provisions of Note 2(g) to § 76.501 shall not apply; and
>
> (2) The provisions of Note 2(a) to § 76.501 regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

A. *De Minimis* Exemption

25. Viacom[55] renewed its request that the Commission adopt a *de minimis* exemption from the attribution standard; *i.e.*, an exemption for vertically integrated program

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[52] *Id.* at 3371, n.19.

[53] *Id.*

[54] 47 C.F.R. §76.1000(b).

[55] Liberty Media also filed a petition which, among other things, contended that the Commission's attribution standard is overinclusive and arbitrary. Liberty Media, however, did not advocate the adoption of a *de minimis* exemption, but rather requested the Commission to incorporate the single majority shareholder, limited partner, and non-voting shareholder exceptions recognized under the broadcast attribution standards. Liberty Media's Petition at 8. This portion of Liberty Media's petition will be dealt with in subsection B, supra.

services whose commonly-owned cable systems account for a relatively insignificant portion of that program service's total subscribership.[56] Viacom contended that a programming vendor should not be considered vertically integrated for purposes of the program access provisions' attribution standard if the programming vendor is under common ownership with cable systems accounting for less than five percent of the total number of subscribers to the particular program service.[57] Viacom requested that the Commission revisit this issue and adopt an exemption based on a study it submitted (the "Crandall Study").[58] Viacom contended that this study "demonstrates conclusively that for virtually any reasonable assumptions concerning affected markets, there will be no ability or incentive to effectively discriminate against alternative technologies at the captive subscribership level proposed by Viacom, (*i.e.*, less than five percent of total subscribership to the given affiliated program service)."[59]

26. The Crandall study analyzes the profitability of discriminatory practices in terms of the potential for such discrimination successfully to induce customers to switch to the vertically integrated firm's cable system. Under the Crandall Study, a rational profit-maximizing firm will engage in a discriminatory policy only if the profits from customer switching are greater than the losses from the decreased sales of the programming. The Crandall Study concludes that there are no economic incentives for anticompetitive behavior by vertically integrated firms with small (under 5%) national subscriber levels. In addition, the Crandall Study indicates that the absence of a *de minimis* exemption will create an impediment to entry into the cable programming market.

27. Viacom also contended that its own behavior in serving alternative technologies supports its proposed exemption:

> recognizing its need to maximize revenues from its program services, [Viacom] has marketed to all alternative distribution technologies on a nationwide basis. For example, distribution by SMATV [satellite master antennae televisions], MMDS [multichannel multipoint distribution service] and TVRO [television receive only] provides approximately 12% of the combined subscriber base of Viacom's premium services, Showtime and The Movie Channel.[60]

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[56] Petition For Reconsideration and Clarification, filed by Viacom International, Inc., June 10,1993 ("Viacom Petition").

[57] Viacom Petition at 2-3.

[58] Crandall R. and Glassman M., *The Economic Case for a De Minimis Exemption From The Commission's Program Access Rules.* ("Crandall Study").

[59] Viacom Petition at 5.

[60] *Id.* at 7.

Viacom further contended that it is in Viacom's interest as a programming vendor to increase penetration to alternative technology distributors in order to limit the bargaining power that cable operators have in their local markets.[61]

28. Landmark filed a reply supporting Viacom's petition and urged the Commission to adopt the Crandall Study's recommended *de minimis* exemption.[62] Likewise, Hearst/ABC-Viacom Entertainment Services, d/b/a Lifetime Television ("Lifetime") submitted a reply supporting Viacom's petition.[63] Lifetime argued that the current attribution standard is more inclusive than necessary to serve the statute's purposes and may hinder capital investment in program creation and distrioution as cable operators may refrain from investing in new or failing program services to avoid the statutory program access requirements.[64] Lifetime cited to its own practices and behavior as confirmation of the Crandall Study's conclusion.[65]

29. Group W Satellite Communications ("Group W") filed comments in support of Viacom's petition on this issue.[66] Group W contended that:

> none of the companies involved in the distribution of either TNN and CMT has any incentive to favor affiliated cable customers. Past conduct of all those companies reveals that distribution policies applicable to the services [TNN and CMT] are formed and followed with no acknowledgment of the existence of affiliated cable

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[61] *Id.* at 8.

[62] Landmark Reply at 3.

[63] Reply Comments of Lifetime Television, July 26, 1993 ("Lifetime Reply").

[64] Lifetime Reply at 4.

[65] *Id.* at 5.

[66] Comments of Group W Satellite Communications in Support of Petitions For Reconsideration and Clarification, July 14, 1993 ("Group W Comments"). Group W is a venture comprised of direct and indirect wholly-owned subsidiaries of Westinghouse Broadcasting Company, Inc. ("WBC"). Group W distributes cable programming services including The Nashville Network ("TNN") and Country Music Television ("CMT"). The TNN service is wholly-owned by Opryland USA Inc, an indirect subsidiary of Gaylord Entertainment Company. The CMT service is wholly-owned by Country Music Television, Inc.("CMTI"), a corporation owned indirectly by subsidiaries of Gaylord and WBC. Group W is affiliated with a cable system that serves approximately 11,000 subscribers and Gaylord owns a majority interest in four cable systems that serve approximately 170,000 subscribers. *Id.* at 2 n. 1.

customers, either in dealings directly with those few cable operations or in dealings with any other third parties.[67]

30. Consumer Satellite Systems, Inc. ("CSS") opposed Viacom's petition contending that as an independent HTVRO [home television receive only] MVPD it has been paying rates to Viacom which appear to be high in relation to rates paid by cable systems with fewer subscribers than CSS and by cable affiliated HTVRO distributors.[68]

31. DirecTV, Inc. ("DirecTV") also opposed Viacom's petition, disputing Viacom's contention that Viacom's own behavior in dealing with MVPD cable competitors supports the *de minimis* exemption it seeks: "Viacom does not mention that it has not yet made its programming available to DirecTV...."[69]

32. The Wireless Cable Association, Inc. ("WCA") opposed Viacom's petition contending, *inter alia,* that despite Viacom's claim of its willingness to deal with alternative technologies, "Viacom has admitted that its pricing policies discriminate against non-cable MVPDs in comparison to cable operators."[70] WCA cited to the Commission's finding in its 1990 Competition Report that the top wireless cable rate for one of Viacom services was 59.1% more than the top rate charged to cable operators.[71]

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[67] *Id.* at 3.

[68] Statement of Opposition of Consumer Satellite Systems, Inc. To Petitions For Reconsideration, July 12, 1993 ("CSS Opposition") at 6. CSS sets forth the following claims:

* Top rate paid by a cable operator for carriage of the Viacom services MTV, VH-1, and Nickelodeon-$0.60.

* Estimated rate paid by cable affiliated HTVRO distributor for MTV, VH-1, and Nickelodeon - $2.40.

* Rate paid by CSS for MTV, VH-1, and Nickelodeon-$3.85.

(citing *Cable TV Programming*, Paul Kagan Associates, Inc. April 30, 1993.)

[69] DirecTv Opposition at 12.

[70] Opposition To Petitions For Reconsideration, July 14, 1993, filed by The Wireless Cable Association International, Inc. ("WCA Opposition") at 8 (citing Comments of Viacom International, Inc., in MM Docket No. 92-265, filed Jan 25, 1993).

[71] *Id.* (citing *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provisions of Cable Television Service*, 5 FCC Rcd 4962, 5117 (1990)).

33. GTE Service Corporation ("GTE") also opposed Viacom's petition contending that it would be inconsistent to adopt Viacom's requested exemption based on perceived attenuation of influence. GTE argued that if programming vendors have incentives to engage in prohibited practices even as to non-affiliated systems, *a fortiori* those incentives remain for affiliated systems.[72] Moreover, GTE noted Viacom's own testimony regarding the general and national power of cable operators to influence the behavior of programming vendors.[73] GTE suggested that in lieu of a flat exemption, the Commission should rely on determinations of public interest under Section 628(c)(4) or a waiver of the rules under Section 1.3 of the Commission's Rules.[74] Viacom's petition also was opposed by Liberty Cable Company Inc.[75] and Bell Atlantic[76] asserting similar arguments raised by other opponents.

34. In response to these oppositions, Viacom contended, *inter alia,* that the existence of price differentials noted by opponents does not refute the Crandall Study's finding that a program service whose affiliated cable systems contribute less than five percent to its subscriber base has no incentive to discriminate. Viacom stated that these opponents have not presented any plausible evidence or theory that would rebut this proposition. Further, Viacom disputed the claims of certain opponents that they have been unfairly treated by Viacom.[77]

35. *Discussion.* We hereby affirm our previous determination on this issue and reject the adoption of a *de minimis* exemption. As noted in the *First Report and Order*, the issue of a *de minimis* exemption was raised in the Notice of Proposed Rulemaking. In the *First Report and Order*, the Commission ultimately rejected this exemption, in part, because it could not be determined with certainty the point at which a vertically-integrated programming vendor does not have the incentive to discriminate. Moreover, the Commission not only was concerned with a cable operator's control over programming, but

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[72] Opposition of GTE, July 14, 1993 ("GTE Opposition") at 3, referring to 8 FCC Rcd at 3370.

[73] *Id.* at 3.

[74] *Id.* at 5-6.

[75] Opposition of Liberty Cable Company, Inc. To Petitions For Reconsideration ("Liberty Cable Opposition") at 3-4.

[76] Bell Atlantic Comments at 4 and Bell Atlantic Reply at 2-3.

[77] For example, Viacom stated that CSS fails to disclose that it enjoys the same rates for Viacom's Showtime and The Movie Channel services as do other HTVRO distributors of those services. Reply Comments of Viacom International, Inc., July 28, 1993 ("Viacom Reply") at 6, n.7.

also recognized that there could be significant influence even with a relatively small vertical interest. While we recognize that there may be situations where an exemption may be appropriate, we decline to adopt an across-the-board *de minimis* exemption.

36. While the Crandall Study correctly notes that vertical relationships in the cable industry are efficient in many ways, we believe the Crandall Study does not provide a sufficient basis for reversing our previous denial of this exemption. First, the analysis in the study does not address the full array of public policy goals implemented in the program access rules in order to prohibit practices that are unfair and discriminatory. Indeed, we previously stated that it was the policy of Congress in the 1992 Cable Act to: "(1) promote the availability to the public of a diversity of views and information through cable television and other distribution media; (2) rely on the marketplace, to the maximum extent feasible, to achieve greater availability of the relevant programming; (3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems; and (4) ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers."[78] While the Crandall study raises a number of issues relating to the incentives of programming vendors and cable operators, and in particular the incentives of *de minimis* vertically integrated programming vendors, the study does not address how those incentives fall within the broad public policy goals. Therefore, we are not convinced that pursuing the Crandall study's recommendation of a *de minimis* exemption would be consistent with our efforts to establish rules that are faithful to the policy goals of Congress. Second, with the exception of DBS, the distribution of multichannel video programming is mostly local in nature. However, the Crandall study does not focus on the impact of discrimination on local competition. For example, the study measures the profitability of discrimination against "national non-cable media such as TVRO distributors or potential DBS system,"[79] in contrast to measuring the impact against local MMDS service. Third, the analysis does not consider the fact that the amount, if any, of vertical integration does not solely drive the incentives of programming vendors to treat distributors differently. Indeed, the size and influence of a customer itself may result in different treatment among technologies, along with other factors as recognized in the justifying factors in the Commission's program access rules.

37. Finally, in passing the program access provisions of the 1992 Cable Act, Congress was concerned with increasing competition and diversity in the multichannel video programming market, as well as fostering the development of competition to traditional cable systems, by prescribing regulations that govern the access by competing multichannel systems to cable programming services.[80] We do not believe that Congress intended the Commission to carve out any exemptions to the program access rules. It is particularly

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[78] *First Report and Order*, 8 FCC Rcd at 3369.

[79] Crandall Study at 11.

[80] *First Report and Order* at 3360.

unlikely that Congress intended such exemptions for an entity, like Viacom, that owns cable systems and controls a large share of the programming market.[81]

B. Minority Ownership

38. Black Entertainment Television, Inc. ("BET") petitioned the Commission to adopt a more flexible attribution standard for minority-owned cable programming vendors or to adopt the single majority shareholder exemption applicable to the broadcast attribution rule.[82] BET contended that the adoption of a more flexible attribution standard for minority-owned cable programming vendors is consistent with the goals of Section 19 (program access) as well as Section 9 (commercial leased access) of the 1992 Cable Act, which allows cable operators to use certain leased access channels for minority programming. BET noted that the goals of Sections 19 and 9 are to increase competition and diversity in the multichannel video programming market.[83] BET further stated that those provisions show that Congress "was acutely aware of the need to assist minority-owned programming sources to further a diversity of viewpoints over cable and other multichannel programming sources."[84] BET contended that, because of the peculiar nature of minority programming (in contrast to programming with mass appeal), BET "needs the flexibility to deal with different program distributors on different terms to obtain access to those distribution sources."[85] In the alternative, BET requested the Commission to adopt the single majority shareholder exception of the broadcast attribution rules. BET argued that the broadcast context is more closely akin to the 1992 Cable Act than is video dialtone, because "[i]n the video dialtone context, there is no stated public interest purpose to promote a diversity of viewpoints, as there is in both the broadcast context and in Section 19 of the 1992 Cable Act."[86]

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[81] Viacom recently acquired Paramount, which further increased Viacom's ownership in the cable programming market.

[82] Petition for Reconsideration filed on behalf of Black Entertainment Television, Inc., June 10, 1993 ("BET Petition"). The single majority shareholder provisions would exclude from the "attributable interest" definition entities in which a single shareholder holds more than a 50% interest. Such entities would be deemed not vertically integrated and therefore not subject to certain of the program access rules, regardless of the size of any cable operator's stake in the entity, on the theory that the unaffiliated majority shareholder will prevent all other shareholders, including any cable investors, from acting anticompetitively.

[83] BET Petition at 3-4.

[84] *Id.* at 3.

[85] *Id.* at 3-4.

[86] *Id.* at 5.

39. Similarly, Liberty Media contended that the 5% attribution standard is overinclusive and arbitrary[87] and that the Commission's adoption of a program access attribution standard by analogy to video dialtone is inappropriate.[88] Liberty Media requested that the Commission revise the attribution standard "so that the reach of its program access and antidiscrimination rules extends only to those situations in which Congress has perceived a potential problem in the marketplace, *i.e.*, where cable operators have both the incentive and the ability to compel discriminatory behavior by an affiliated programmer,"[89] or that the Commission incorporate the single majority shareholder, limited partner, and non-voting shareholder exemptions recognized under the broadcast attribution standards.[90]

40. WCA and GTE filed oppositions to BET's petition.[91] WCA argued that BET's request is inconsistent with the purposes of Section 628 and that "there is no indication in Section 628 or its legislative history that Congress intended the Commission to establish special program access rules for educational services or those that are minority owned."[92] WCA also contended that BET's reliance on Section 9(c) of the 1992 Cable Act is particularly misplaced because that section shows that, when Congress intended special treatment for minority and other programming, it explicitly so stated. For example, Section 9(c) expressly allows cable operators to use certain leased access channels for educational or minority programming.[93] WCA stated that "subjecting BET and Discovery to the modest anti-discrimination rules of Section 628 will assure the greatest possible number of subscribers will have access to the minority and educational programming BET [and Discovery] offer."[94]

41. Finally, GTE contended that if a minority-owned cable programming vendors' exemption is adopted, alternative delivery systems may be foreclosed from distributing the

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[87] Petition for Reconsideration filed on behalf of Liberty Media Corporation, June 10, 1993 ("Liberty Media Petition") at 8.

[88] *Id.*

[89] Liberty Media Petition at 12 (emphasis in original).

[90] Id.

[91] In their oppositions, WCA and GTE address together the petition filed by BET and the petition filed by Discovery. Discovery sought an exemption for educational/informational programming. Discovery's petition is discussed. supra.

[92] WCA Opposition at 20-21.

[93] *Id.* at 21.

[94] *Id.* at 21-22.

BET-type services because of cable's market power. GTE opposed "blanket exceptions to the program access rules," and proposed that "alternative media [be given] the opportunity to comment, in a public-interest proceeding, on the pros and cons of exclusive contracts where minority, educational and informational programming is concerned."[95] GTE further stated that, to the extent the exceptional treatment goes beyond exclusive contracting, public interest determinations would be available under the Commission's general waiver authority.[96]

42. BET replied to the WCA and GTE oppositions, contending that, since the Commission adopted broadcast attribution standards in its horizontal and vertical ownership proceedings, those standards should also apply to program access.[97] BET also disputed WCA's contention that Section 9(c) shows that when Congress intended to afford minority programming special treatment, it so provided. BET argued that Section 19 and Section 9 both seek to increase competition and diversity in the multichannel video programming market, and that Congress left it to the Commission to determine how to fulfill this purpose.[98]

43. Various parties also opposed Liberty Media's petition contending, *inter alia*, that the goals underlying the Commission's broadcast rules differ from those under the 1992 Cable Act.[99] For example, DirecTv opposed Liberty Media's petition contending that there are different rationales underlying the broadcast rules and the 1992 Cable Act.[100] WCA contended that Congress not only was concerned with cable's direct control over programming, but also sought to address inequities resulting because "[v]ertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."[101]

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[95] GTE Opposition at 6.

[96] *Id.* at 7.

[97] Consolidated Reply To Oppositions To Petition For Reconsideration, July 26, 1993 ("BET Reply") at 1-2.

[98] *Id.* at 2.

[99] Comments of Bell Atlantic on Petitions for Reconsideration at 9-10,WCA Opposition at 17, Opposition of DirecTV, Inc., To Petitions for Reconsideration, July 14, 1993("DirecTv Opposition") at 6, Reply of the United States Telephone Association, July 27,1993 ("USTA Reply") at 1. USTA also generally opposes the petitions filed by Viacom, Discovery and BET seeking the Commission's adoption of exemptions to the program access attribution standard.

[100] Opposition of DirecTV, Inc., To Petitions for Reconsideration, July 14, 1993("DirecTV Opposition") at 6.

[101] WCA Opposition at 18.

44. *Discussion.* We reject BET's request to adopt a more flexible attribution standard for minority-owned programming vendors or the single majority shareholder provisions of the broadcast attribution standard. Neither Liberty Media nor BET raise any new arguments that warrant a change in our determination in the *First Report and Order* that, for purposes of adopting an "attributable interest" standard, the goals behind the 1992 Cable Act are more closely analogous to the goals underlying the video dialtone rules than the broadcast rules. Indeed, similar to the 1992 Cable Act, one of the stated public interest purposes behind the video dialtone rules is to promote the availability to the public of a diversity of views and information through this distribution media.[102] In contrast, the concerns addressed in the Commission's horizontal and vertical ownership proceedings, where the broadcast attribution standards were adopted, are quite different from the concerns in program access. In particular, the amount of ownership and, therefore, an entity's "control" is the focus of the vertical and horizontal ownership rules. By comparison, the attribution standard in the program access rules is focused on the potential "influence" on programming vendor behavior through ownership by cable interests, irrespective of the amount of ownership that may be involved. Thus, contrary to petitioners' position, it is not inconsistent to exclude the single majority shareholder rule from the program access attribution standard. In addition, BET does not offer any explanation as to the type of "flexibility" standard it wants or needs, or what, in lieu of the single majority rule, would provide a more "flexible" standard .

45. Moreover, we do not believe that the adoption of a more flexible attribution standard for minority-owned programming vendors or the single majority shareholder provisions of the broadcast attribution standard furthers the underlying goal of encouraging minority ownership and diversity in programming. Rather, we believe that a departure from the current attribution standard merely raises issues regarding whether minority programming vendors should be able to restrict access to their programming and thus has the potential to conflict with one of the underlying purposes of Section 19 -- to foster the availability of programming to MVPDs.

C. Educational/Informational Exemption

46. Discovery requested the Commission to fashion an exemption to the program access provisions for educational or informational type programming.[103] Discovery argued that such an exemption would be consistent with the purposes of the 1992 Cable Act to

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[102] Memorandum Opinion and Order on Reconsideration in CC Docket No. 87-266 (November 7, 1994) at ¶3.

[103] Petition for Clarification and Reconsideration, filed on behalf of Discovery Communications, Inc., June 10, 1993. ("Discovery's Petition").

promote the availability of programming of an educational or informational nature.[104] Discovery also cited The Children's Television Act of 1990 as evidence of Congressional intent to promote educational or informational type programming.[105] Discovery argued that "common ownership of cable systems and an educational/informational program service should have little effect on the ability of alternative technology distributors to compete with cable . . . . The historic operations of these educational/informational services . . . demonstrates a very high level of even-handedness in dealings with all distribution technologies."[106]

47. GTE opposed Discovery's request, contending that this exemption ultimately will result in the denial of certain programming services to alternative technologies. GTE instead proposed a case-by-case analysis.[107]CSS also opposed Discovery's petition, contending that an exemption for educational and informational programming "would ultimately protect . . . distributors from unwanted competition. If programming is truly of an educational nature and for the benefit of the public, the goal of the Commission should be to assure its broadest distribution through competing technologies."[108] DirecTV contended "that the creation of such an exemption would in fact have quite undesirable ramifications for alternative MVPDs."[109] Finally, WCA contended that Discovery's past conduct does not provide support for its exemption from the rules.[110]

48. Discovery replied to the oppositions, contending among other things, that educational or informational programming has historically had to rely on investment support from various types of distributors and that there is a need to promote policies that will encourage investment in educational and informational type programming.[111] Discovery contended that exempting such programming from the program access rules will serve the public interest by ensuring that high quality, innovative programming continues to receive

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[104] *Id.* at 3.

[105] *Id.* at 2-3.

[106] *Id.* at 3.

[107] Opposition of GTE at 6.

[108] Statement of Opposition of Consumer Satellite Systems, Inc. to Petitions for Reconsideration at 5.

[109] Opposition of DirecTv, Inc., at 13.

[110] WCA Opposition at 22 n. 52.

[111] Reply Comments of Discovery Communications, Inc., July 28, 1993 ("Discovery Reply") at 5.

financial support.[112]

49. *Discussion.* We deny Discovery's request to exempt from the program access provisions programming of an educational or informational nature. While ample evidence exists that Congress intends to promote this type of programming, (e.g.,The Children's Television Act of 1990), we do not believe that granting Discovery's request is the most appropriate way of effectuating this policy. Indeed, Discovery's petition does not address the underlying purposes of the attribution standard, e.g., an assessment of a cable operator's influence over a vertically integrated programming vendor. Moreover, we believe that the rules should not allow educational and informational programming vendors to pursue practices that could be construed as "unfair" or "discriminatory" in making their programming services available, contrary to the stated goals of Section 628. Rather, we believe that a departure from the current attribution standard has the potential to affect the consistent application of the program access rules and the accessibility of this type of programming. Finally, we find that Discovery has not provided sufficient evidence that this exemption is necessary to attract investment, and that there are no alternative means of attracting financial backing for this type of programming.

D. Exemptions for Marketing/Technology Experiments and Demonstrations

50. The issue as to whether there should be an exemption from the program access provisions in general, or from the attribution standard in particular, for marketing and technology experiments and demonstrations, was not before the Commission in the *First Report and Order*. In any event, Discovery petitioned the Commission to exempt marketing and technology experiments and demonstrations from the program access rules.[113] Discovery contended that, "as new technologies allow distributors to increase the number of services provided and alter the manner in which subscribers interact with those services, a programming vendor's ability to test various program services and technologies designed to allow subscriber interaction takes on paramount importance. The need to structure and conduct such tests on an expedited basis to keep pace with these changes is equally important."[114] Discovery contended that the Commission should not require a programming vendor to seek approval for each marketing and technological experiment because programming vendors need to structure and conduct tests on an expedited basis to remain competitive.[115] No comments were filed either in support of or in opposition to this petition.

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[112] *Id.* at 6.

[113] Discovery Petition at 10.

[114] *Id.* at 10-11.

[115] *Id.* at 11.

51. *Discussion.* The Commission recognizes the necessity for programming vendors to conduct marketing and technology experiments and demonstrations. We believe, however, that to establish the requested exemption to the program access rules would raise unnecessarily the potential for abuse and circumvention of the rules. In any event, we believe that the program access rules already accommodate the need for experiments and demonstrations and that a general exemption is unnecessary. In particular, Note 2 to the program access rules provides in part that "[v]endors may establish price differentials based on factors related to offering of service. . . ." The note goes on to list a number of factors as differences in the offering of service, but indicates that the list is not exclusive and may include "other legitimate factors as standardly applied in a technology neutral fashion."[116] We believe this language could enable a programming vendor to engage in experiments or demonstrations without becoming subject to any general requirement that it provide an experimental service to all MVPDs or that it maintain for a general commercial offering a price that was intended solely for market research purposes. Of course, should a complaint be filed, the Commission will review the particular facts to determine whether the differential in price or other terms offered is justified.

E. Vertical Integration in Market at Issue

52. In the *First Report and Order*, the Commission refused to require, as an element of a claim under Section 628(c), a showing of vertical integration in the specific market at issue:

> [r]ather, the complainant need show only that the relevant programmer or cable operator is vertically integrated in any market. We believe that this approach is most consistent with Congressional intent and best addresses Congress' apparent concern with industry-wide influences that can occur even in the absence of a vertical relationship in the complainant's specific market.[117]

53. Time Warner Entertainment Company, L.P. ("Time Warner") renewed the request that the Commission should require, as an element of a claim under Section 628(c), a showing of vertical integration in the specific area at issue.[118] Time Warner contended that this limitation is necessary because "vertically integrated programming vendors can have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies, . . . only where they in fact have an

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[116] *First Report and Order*, 8 FCC Rcd at 3506.

[117] *First Report and Order*, 8 FCC Rcd at 3363.

[118] Petition of Time Warner Entertainment Company, L.P., for Reconsideration, June 10, 1993 ("Time Warner Petition").

interest in a local cable operator."[119] Time Warner further contended that the Commission cannot have it both ways:

> [h]aving decided to make its rules applicable only to vertically integrated firms on the ground that Congress was concerned with practices pursued only by vertically integrated firms ... the Commission cannot now go beyond that rationale and regulate conduct that has nothing to do with vertical integration.[120]

54. Time Warner's petition was supported by Landmark. Landmark contended that "[i]n markets where a programmer has no ownership interest in the cable operator, not only would it be illogical, it would be literally impossible for a programmer to engage in anticompetitive conduct as a result of vertical integration, since no such integration exists."[121]

55. Time Warner's petition was opposed by Bell Atlantic, CSS, DirecTv, Liberty Cable and WCA. DirecTv argued that Congress passed Section 628 primarily because of its concern with the overall level of vertical integration between cable operators and video programming suppliers, and a programming suppliers' incentive to discriminate in favor of cable providers. According to DirecTv, this incentive can exist regardless of whether a vertically integrated programming vendor is integrated with a cable operator in a particular geographic market.[122] WCA, along with Bell Atlantic and CSS,[123]argued that there is no support either in Section 628 or the legislative history of the 1992 Cable Act to support Time Warner's contention that the Commission may only regulate activities stemming from vertical integration in a particular market.[124] WCA and Liberty Cable further argued that Congress recognized that a vertically integrated programming vendor has strong incentives to discriminate against non-cable MVPD's, even in markets where the programming vendor does not serve a vertically integrated cable operator.[125]

56. *Discussion.* The Commission denies Time Warner's petition and affirms that, with respect to claims under Section 628(c), there is no requirement to show vertical integration in the specific market at issue. As we previously stated, Congress was concerned

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[119] Time Warner Petition at 7.

[120] Id. at 9.

[121] Landmark Reply at 8.

[122] DirecTv Opposition at 9.

[123] Bell Atlantic Comments at 8; Bell Atlantic Reply at 3-4; CSS Opposition at 3-4.

[124] WCA Opposition at 5.

[125] WCA Opposition at 5; Liberty Cable Opposition at 4.

with industry-wide influences that can occur even in the absence of a vertical relationship in a complainant's specific market. Indeed, in the *First Report and Order*, the Commission recognized that there could be incentives to act anticompetitively even in non-vertically integrated markets, if the goal of the behavior is to prevent or hinder the development of competition anywhere. Further, in the *First Report and Order*, we cautioned against failing "to sufficiently consider the historical allegations of discrimination on which Congress based its decisions to enact Section 628" and against assuming "that the behavior of a non-integrated entity is inherently justifiable."[126]

IV. COMPETITIVE HARM OR HINDRANCE TO ACCESS AS AN ELEMENT OF RULES

57. Section 628(b) provides that:

> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[127]

Section 628(c) requires the Commission to adopt regulations proscribing particular specified conduct, specifically to:

> (A) establish safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor;
>
> (B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale and delivery of satellite cable programming or satellite broadcast programming among or between cable systems, or other multichannel video programming distributors, or their agents or buying groups;
> ...

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[126] *First Report and Order*, 8 FCC Rcd at 3405.

[127] 47 U.S.C. § 548(b).

(C) prohibit practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section; and

(D) with respect to distribution to persons in areas served by a cable operator, prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines (in accordance with paragraph (4)) that such contract is in the public interest.[128]

58. In the *First Report and Order*, the Commission determined that "parties bringing a complaint under Section 628(b) must demonstrate how the allegedly unfair practice has hampered or prevented the distribution of programming."[129] However, with respect to complaints brought pursuant to Section 628(c), we determined that:

> the legislative history indicates that Congress did not intend to place a threshold burden on aggrieved MVPDs to show either specific or generalized harm to competition in those circumstances specifically prescribed in subsection (c). . . Rather, we believe that if behavior meets the definitions of the activities proscribed in subsection (c), such practices are implicitly harmful.[130]

59. Liberty Media requested reconsideration of the Commission's determination that a showing of harm is not required for violations of Section 628(c).[131] Liberty Media argued that Section 628(d) establishes a uniform standing requirement for all program access complaints, under which a complainant must show an injury-in-fact to bring a complaint for

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[128] 47 U.S.C. 548(c).

[129] *First Report and Order*, 8 FCC Rcd at 3374.

[130] *Id.* at 3377

[131] Liberty Media Petition at 3-8.

a violation of both Section 628(b) and the rules adopted pursuant to 628(c).[132] Liberty Media argued that the language of 628(d) requires the "aggrieved" complainant to show harm.[133] Superstar supported Liberty Media's petition contending that a party commencing an administrative proceeding must suffer injury protected by the statute. Superstar stated that the injury is the result of preventing access to programming and that, where there is no showing of harm, the complainant has no standing.[134]

60. Several oppositions were filed against Liberty Media's interpretation of Section 628(d).[135] For example, GTE contended that administrative agencies are not bound by judicial rules of standing in determining what parties to admit to adjudicatory or rulemaking proceedings.[136] DirecTV contended that Liberty Media's argument that the term "aggrieved MVPD" in Section 628(d) imposed a "uniform 'injury-in-fact'" standing requirement for adjudication of complaints under Sections 628(b) and 628(c) is incorrect.[137] DirecTv argued that Section 628(d) does not address the circumstance under which a complainant is required to show an injury, while Section 628(c) does enumerate *per se* violations where Congress presumed injury.[138] WCA argued that neither the language in Section 628(d), nor the legislative history, support establishing a "uniform standing requirement" or mandated a complainant to establish an inability to compete.

61. Liberty Media responded that, under the canons of statutory interpretation, the Commission should interpret the words in 628(d) by taking their ordinary meaning[139] and that

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[132] *Id.* at 5. Section 628(d) provides that "any multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of subsection (b), or the regulations of the Commission under subsection (c), may commence an adjudicatory proceeding at the Commission." 47 U.S.C. § 548(d).

[133] *Id.* at 8.

[134] Superstar Opposition at 15.

[135] DirecTV Opposition at 4; Bell Atlantic Opposition at 7; GTE Opposition at 8; WCA Opposition at 12.

[136] *Id.* (citing Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters § 3531.13 and California Assn. of Physically Handicapped, Inc. v. FCC, 778 F.2d 823, 826 (D.C. Cir. 1985)).

[137] DirecTv Opposition at 4.

[138] *Id.*

[139] Liberty Media Reply at 4 n. 2 (citing *Perrin v. United States,* 444 U.S. 37, 42 (1979)).

the ordinary meaning of 628(d) is that a complainant must be aggrieved by conduct alleged to violate Section 628(b) or Section 628 (c).[140]

62. *Discussion*. We affirm our prior determination that there is no requirement to show harm in a complaint alleging violations of conduct prohibited under Section 628(c). Instead, Congress presumed that the conduct enumerated in Section 628(c) injured competition. The Commission finds that Liberty Media's interpretation of Section 628(d) is without merit, especially in the context of the statutory language in the 1992 Cable Act. The 1992 Cable Act does not impose a standing requirement on a complainant analogous to that required to appear before Article III courts. Indeed, various courts have held that Article III standing restrictions do not apply to proceedings before administrative agencies.[141] Courts also have held that "the Commission may choose to allow persons without Article III 'standing' to participate in FCC proceedings .... "[142] Moreover, Section 628(d) provides for adjudication before the Commission of a complaint brought by a MVPD aggrieved by an alleged violation of 628(b) or 628(c), and does not address the substantive requirements for each offense. Rather, whether an MVPD has been aggrieved by a violation of Section 628(b) or (c) turns on the substantive requirements contained in those sections and the Commission's rules.

V. CONFIDENTIALITY

63. *Background*. In the *First Report and Order*, the Commission established complaint procedures for MVPDs aggrieved by alleged violations of Section 628. In order to minimize the number of complaints brought before the Commission,[143] and to encourage parties to attempt "to resolve the dispute without involving the Commission"[144] the

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[140] *Id.* at 3.

[141] *Gardner v. FCC*, 530 F.2d 1086, 1090-91 (D.C. Cir. 1976); *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 605-608 (D.C. Cir.), *cert denied* 439 U.S. 1052 (1978); *Ecee Inc. v. FERC*, 645 F.2d 339, 349-350 (5th Cir. 1981); *American Trucking Assns. v. ICC*, 673 F.2d 82, 85 n. 4 (5th Cir. 1982) , *cert denied* 460 U.S. 1022 (1983); *Ingalls Shipbuilding Division v. White*, 681 F.2d 275, 280-288, *rehearing denied* 690 F.2d 905 (5th Cir. 1982); *California Assn of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 826 (1985 D.C. Cir.); *City of St. Louis v. Department of Transportation*, 936 F.2d 1528, 1532 (8th Cir. 1991).

[142] *California Association of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 826 n.8 (1985 D.C. Cir.).

[143] *First Report and Order*, 8 FCC Rcd at 3389, 3416 & 3424.

[144] *Id.* at 3416.

Commission promulgated Section 76.1003(a),[145] which requires any aggrieved MVPD intending to file a complaint under this section to "first notify the potential defendant cable operator, and/or the potential defendant satellite cable programming vendor or satellite broadcast programming vendor, that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in Sections 76.1001 or 76.1002." In addition, Section 76.1003(a) requires that "the potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission."[146]

64. In the *First Report and Order*, the Commission also determined that programming vendors submitting contracts or other proprietary information in response to complaints under § 76.1003 should be able to request confidentiality to prevent widespread access to the information.[147] The Commission stated that the complainant will be granted access to such contracts or proprietary information "provided it agrees to abide by the terms of a protective order that limits access to such information and limits the purposes for which any information obtained through the Section 628 complaint process may be used."[148] Section 76.1003(h)[149] sets forth the confidentiality protection for proprietary information and provides that:

> (1) Any materials generated or provided by a party in the course of adjudicating a program access complaint under this provision may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b) ... .

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[145] 47 C.F.R. §76.1003(a).

[146] Id.

[147] See *First Report and Order*, 8 FCC Rcd at 3391 n.103, 3419.

[148] *Id.* In the *First Report and Order*, the Commission established requirements that the complainant "take reasonable steps to prevent unauthorized access to protected documents and information [and] to limit access to the individual complainant, the attorneys listed with the Commission as the representatives of the complainant, their staffs and any expert advisors or analysts." *Id.* at 3391 n. 103. The Commission further set forth procedures for insuring that the information is available only to those specified individuals and is used solely for purposes related to the complaint. The Commission stated that "any failure to abide by the terms of the protective order may result in the imposition of sanctions, including dismissal of the complaint, or censure, suspension or disbarment of the attorneys involved." *Id.*

[149] 47 C.F.R. §76.1003(h).

(2) Materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(i) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(ii) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;

(iii) Consultants or expert witnesses retained by the parties;

(iv) The Commission and its staff; and

(v) Court reporters and stenographers in accordance with the terms and conditions of this section.[150]

Thus, § 76.1003(h) governs material and information produced after a program access complaint is filed, and does not govern material or information exchanged between the parties during the pre-complaint period required under §76.1003(a).

65. *Pre-Complaint Confidentiality*. Liberty Media petitioned the Commission to extend the protections available for proprietary information under §§ 76.1003(h) and (i) to information and contracts provided to an opposing party by a programming vendor during the pre-complaint notice and negotiation period, "[i]n order to facilitate the exchange of information to promote pre-complaint resolution of disputes."[151] Liberty Media contended that the Commission inadvertently undermined pre-complaint resolutions of disputes by not extending the rules' protection of confidential materials to pre-complaint submissions.[152] No party opposed Liberty Media's petition on this issue.

66. *Discussion*. We grant Liberty Media's petition on this issue, and we amend the rules specifically to extend the confidentiality protections for proprietary information contained in §§ 76.1003(h) and (i) to proprietary information exchanged among parties during the pre-complaint negotiation period required under § 76.1003(a). The pre-complaint notification requirement furthers the Congressional policy of relying on the marketplace to

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[150] Similar confidentiality protection is afforded to proprietary information exchanged during discovery or contained in briefs filed with the Commission. *See* § 76.1003(i).

[151] Liberty Media's Petition at 14.

[152] *Id.* at 13.

achieve the goals of the 1992 Cable Act.[153] The Commission believes that failure to extend confidentiality protections to documents exchanged during the pre-complaint stage merely will encourage parties to delay exchanging pertinent information until a complaint is filed, rendering the pre-complaint notice period less meaningful. The Commission believes that extending the confidentiality protection during the pre-complaint period may encourage parties to engage in an exchange of information and further the Commission's stated purpose of having the parties resolve disputes without involving the Commission.

67. *Persons Authorized To Have Access to Confidential Materials.* Viacom and Discovery petitioned the Commission "to take further steps to ensure that complainants are not able to use the complaint process to gain access to confidential information."[154] Specifically, Viacom and Discovery contended that, upon proper justification or good cause shown, a programming vendor should be allowed to preclude the complainant from viewing confidential or proprietary information[155] and that access to such information should be limited to the complainant's outside attorneys and the Commission's staff. Viacom and Discovery recognized that complainants must have access to information sufficient to establish its case, but contended that the complaint process should not enable complainants to gain an unfair advantage in future business dealings with the defendant.[156]

68. Superstar filed comments and noted that a number of the complaining distributors under the program access rules also are the competitors of the same programming vendors from which they purchase their programming and, thus, much of the programming vendors' financial information is sensitive and must not be disclosed to complaining distributors.[157] Superstar contended that "production of confidential business information should be limited to only the attorneys of the complainant, and not to anyone in the business organization of the complainant, even those 'participating' in the complaint proceeding."[158] In contrast to Viacom and Discovery, Superstar did not condition this restriction upon a proper justification or good cause showing.

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[153] 1992 Cable Act § 2(b)(2).

[154] Discovery Petition at 7-8; Viacom Petition at 14-15.

[155] Viacom Petition at 15; Discovery Petition at 7.

[156] *Id.*

[157] Superstar Opposition at 17. To support its position, Superstar notes that NRTC sought disclosure, under the Freedom of Information Act, of every term and condition of every programming contract involving Superstar as well as financial information. NRTC's request was denied by the Commission. *Id.* at 17-18.

[158] *Id.*

69. DirecTV opposed Viacom and Discovery's petitions. DirecTV stated that Discovery's proposal "goes too far" because "[a] complainant's attorneys may not possess the requisite expertise or industry knowledge to make informed judgments as to what information is relevant or important in sifting through documentation provided by programming vendors in the discovery process. It is therefore vital that some corporate representative of the complainant be permitted access to such information." DirecTV stated that the Commission's "detailed and reasonable method of affording protection to proprietary material in those circumstances where programmers request confidentiality" is sufficient protection.[159]

70. Discovery responded to DirecTV's opposition, rejecting the suggestion that a complainant's personnel must have access to sensitive information because counsel may not have the expertise or industry knowledge to make informed judgments as to what is relevant or important. Discovery contended that "[t]here simply is no reason to assume that a company's counsel is unable to grasp the knowledge necessary to build a case on behalf of his or her client".[160] Discovery also stated that, under its proposal, the Commission will have the ability to review the disputed documents, *in camera*, and thus the decision maker will have the benefit of the information sought by the complainant.[161]

71. *Discussion.* We have determined to grant, in part, the petitions of Viacom and Discovery on this issue. The Commission agrees that, due to the competitively sensitive nature of some information, there may be situations where it is necessary to restrict access to a party's proprietary information to a smaller group of individuals than currently provided under the rules. That is, there may be situations where such information is protected from disclosure to a competitor's business personnel. However, the proposed restriction to limit access solely to outside counsel for the complainant and the Commission staff may result in unfairness to a company relying on its in-house staff (including in-house counsel) to resolve the complaint and has the potential for abuse and for hindering the complaint process. The Commission thus will amend Section 76.1003(h)(3) to provide that the Commission will entertain, subject to a proper showing a party's request to further restrict access to proprietary information as specified by the party. The opposing party will have an opportunity to respond to such requests.

VI. COST JUSTIFICATION

72. *Background.* Section 628(c)(2)(B) of the 1992 Cable Act requires the Commission to promulgate regulations that:

> prohibit discrimination by a satellite cable programming vendor in which a cable

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[159] DirecTV Opposition at 14.

[160] Discovery Reply at 9.

[161] Id.

> operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors or their agents or buying groups.[162]

Under Section 628(c)(2)(B)(ii) of the 1992 Cable Act, however, it is acceptable to establish "different prices, terms and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming."[163]

73. The *First Report and Order* stated that "[w]e will generally permit vendors to employ legitimate discounts associated with the factors specified in Section 628(c)(2)(B), provided that similar terms are standardly available to various distributors." The Commission adopted definitions and guidelines for the factors involving, generally, (i) cost differences at the wholesale level among distributors, (ii) volume differences, (iii) creditworthiness and financial stability, and (iv) differences in "offering of service".[164] In connection with cost differences at the wholesale level among distributors, the Commission noted that:

> the record in this proceeding supports the preliminary conclusion in the *Notice* that service to HSD [home satellite dish] distributors may be more costly than service to others using different delivery systems such as cable operators, as additional costs are often incurred for advertising expenses, copyright fees, customer service, DBS Authorization Center charges and signal security.[165]

Accordingly, the Commission stated that its regulations would allow vendors to base programming prices on legitimate cost factors. The Commission noted, however, that vendors "will incur the risk and burden of showing that the cost factors they claim cause a price differential are legitimate and are not designed to conceal prohibited discrimination."[166]

74. In addition, the Commission assessed the scope of the "cost" justification under the 1992 Cable Act, and examined whether "a vendor may take into account those cost differences incurred by distributors in providing service to subscribers -- cost differences at the retail level -- when justifying price differences for programming as charged to

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[162] 47 U.S.C. § 548(c)(2)(B).

[163] 47 U.S.C. § 548(c)(2)(B)(ii).

[164] *First Report and Order*, 8 FCC Rcd at 3405.

[165] *Id.* at 3406.

[166] *Id.*

distributors."[167] While the Commission recognized that costs incurred by some distributors when delivering their services to consumers may be lower than for others (e.g., HSD v. cable), the Commission determined that:

> it would be contrary to the purposes of the Act and disserve the public to allow vendors to charge higher prices based on this factor. In particular, we believe that such a result could artificially raise the retail price of programming and discourage the development of low-cost technologies contrary to the statute's goals. Moreover, contrary to the claims of some commenters that HSD distributors will simply retain any savings rather than pass them on to HSD users, we believe the HSD market is sufficiently competitive to ensure that savings will inure to the benefit of the public. Accordingly, we will generally reject a vendor's consideration of a distributor's costs in delivering service to subscribers. A vendor who can show that the lower price offered to the distributor will not result in lower prices to consumers because the distributor is simply retaining the potential cost savings in the form of higher profits, can justify a price differential based on retail costs.[168]

75. *Costs at the Retail Level.* Viacom petitioned the Commission to reconsider its decision and allow a programming vendor to consider differences in cost at the distributor's level. In support of its position, Viacom relied on a colloquy between Senators Kerry and Inouye regarding the costs that may be considered by vendors. According to Viacom, this colloquy made it clear that a distributor's costs can be considered in justifying the programming vendor's price differentials.[169]

76. Bell Atlantic and WCA opposed Viacom's petition on this issue. Bell Atlantic claimed that both the statutory language and common sense make it clear that a difference in the buyers' costs cannot justify a price differential unless such costs have a demonstrable

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[167] *Id.* at 3406.

[168] *Id.*

[169] Viacom Reply at 9-10. Viacom argued the following:

> Sen. Inouye, a principal sponsor of the 1992 Cable Act, answered in the affirmative Sen. Kerry's question, 'Am I correct in understanding that as used in subsection 2(B)(ii) the cost of creation, sale, delivery or transmission of programming refers to costs incurred at the multichannel video programming distributor's level as well as at the program vendor's level?'

In the *First Report and Order*, the Commission noted that the comments submitted were divided as to the appropriate interpretation of this colloquy. 8 FCC Rcd at 3406 n.177.

impact on the seller's costs.[170] Bell Atlantic and WCA also disagreed with Viacom that any weight should be given to the colloquy between Senators Kerry and Inouye.[171]

77. *Discussion.* We affirm our determination that vendors may not take into account cost differences in delivering service to subscribers when justifying price differences for programming charged to distributors.[172] We also affirm what we said in the *First Report and Order*, that it would be contrary to the purposes of the Act and disserve the public to allow vendors to charge higher prices based on a distributor's cost differences at the retail level. To do so could result in the artificial raising of retail prices for programming as well as discourage the development of low-cost technologies contrary to the goals of the Act.[173]

78. *Pre-judgment of HSD Cost Differentials.* NRTC claimed that the *First Report and Order* suggests that the Commission has pre-judged questions regarding possible cost justifications for pricing differentials in sales to HSD distributors. NRTC "disagrees strongly with the Commission's apparent conclusion in this proceeding that service to HSD distributors is more costly than service to others using different delivery technologies," and "urges the Commission not to foreclose in this proceeding a full explanation in subsequent complaint proceedings of the satellite carriers' claimed cost 'justification' for their discriminatory prices."[174] CFA supported NRTC's petition.

79. Superstar opposed NRTC's petition, contending that NRTC's petition merely is an attempt to eliminate cost-based differentials.[175] United Video stated that it supports the Commission's conclusion that in the pricing of video programming there are justifiable price differences among MVPDs, and that this finding is consistent with the 1992 Cable Act's

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[170] Bell Atlantic Comments at 5-6.

[171] *Id.* at 5. Bell Atlantic also contended that Viacom's reliance on the Senators' colloquy to support its position is misplaced, because, according to Bell Atlantic, courts hold that these "kinds of snippets from the legislative history are entitled to little weight." (citing *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982); *RCA Global Communications, Inc. v. FCC*, 758 F.2d 722, 733 (D.C. Cir. 1985)); WCA Opposition at 23.

[172] However, as we stated in the *First Report and Order*, a vendor who can show that the lower price offered to a distributor will not result in lower prices to consumers, because the distributor is simply retaining the potential cost savings in the form of higher profits, can justify a price differential based on retail cost. 8 FCC Rcd at 3407.

[173] *First Report and Order*, 8 FCC Rcd at 3406.

[174] NRTC Petition at 16-20.

[175] Superstar Opposition at 8-12.

recognition that some price differentials are necessary.[176] Liberty Media also opposed the petition contending that the Commission's decision was based on statutory and marketplace realities.[177]

80. Time Warner contended that the Commission has not incorrectly prejudged the higher costs,[178] but in any event, NRTC's dispute with the Commission on this point is trivial because whether a particular HSD distributor has higher or lower costs associated with its distribution is a question that will be resolved during the complaint process.[179] NRTC replied that it agreed with Time Warner's statement and requested the Commission to clarify that cost justification issues are resolved at the time of the disposition of particular complaint proceedings.[180]

81. *Discussion*. The Commission rejects NRTC's contention that, in the *First Report and Order*, we prejudged the costs that vendors may incur in supplying programming to HSD distributors. Rather, in the *First Report and Order*, the Commission merely recognized that cost differentials can exist and may be used to justify a price differential. The Commission did not make any determinations regarding the magnitude or the effect of any such price differentials, and did not intend to draw conclusions as to their presence in particular markets. We do agree with Time Warner and NRTC that resolution of specific cost justifications must be addressed through the adjudicatory process.

VI. EFFECTIVE DATE/APPLICATION OF RULES

82. *Background*. In the *First Report and Order*, the Commission determined that the rules adopted under Section 628 apply prospectively to all existing contracts, whether the contracts were executed before or after the effective date of the rules.[181] The Commission

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[176] United Video's Opposition at 3.

[177] Liberty Media Opposition at 13.

[178] Time Warner Opposition at 8-9.

[179] Id. at 10.

[180] NRTC Reply at 9.

[181] *First Report and Order*, 8 FCC Rcd at 3414. To be consistent with cases that proscribe retroactive application of regulations, absent clear congressional intent, the Commission noted that:

> the anti-discrimination rules adopted will not affect prices paid for past video programming services or penalize vendors for practices preceding passage of the Act.

stated that Congress would not have expressly grandfathered only a narrow class of contracts in Section 628(h) if it had intended generally to exempt all existing contracts from the scope of the anti-discrimination requirements of Section 628.[182] In addition, the Commission noted that the long term nature of many programming agreements would delay for several years the uniform implementation of rules intended to prohibit discriminatory practices within the video programming distribution industry. Thus, the Commission stated that Congress intended that rules promulgated to implement Section 628 should be applied prospectively to existing contracts, except as specifically provided for in Section 628(h).[183] To avoid disruption to the market, parties were afforded 120 days after the effective date of the new rules to bring their agreements into compliance with § 76.1002(f),[184] which provides:

> All contracts [except those specifically grandfathered], related to the provision of satellite cable programming or satellite broadcast programming to any multichannel video programming distributor must be brought into compliance with the requirements specified in this subpart no later than November 15, 1993.[185]

83. *Application of the Discrimination Rules to Existing Contracts*. Time Warner and others petitioned the Commission to reconsider its decision to apply the discrimination rules under Section 628 to existing contracts. Time Warner argued that "it is fundamentally unfair now to force a programming vendor to sell to all competing distributors at a price that the vendor, in its business judgment, decided in the past that it could offer to some but not all."[186]

84. Superstar likewise contended that the Commission should exempt existing contracts from the discrimination rules. Alternatively, Superstar argued that the Commission should confirm that discrimination claims under existing contracts only can be remedied by

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> The Commission will, however, apply the rules adopted under Section 628 prospectively to all existing contracts, whether they were executed before or after the effective date of the rules.

Id. at 3415.

[182] *Id.* at 3415.

[183] *Id.*

[184] *Id.*

[185] 47 C.F.R. § 76.1002(f).

[186] Time Warner Petition at 5.

amendment and not by monetary sanctions or damages.[187]

85. Various parties filed oppositions to Time Warner's petition. GTE stated that "Congress' choice of June 1990 as the statutory grandfathering date must be taken as strong indication that the legislators considered parties contracting thereafter about program access to be on sufficient notice that the pending bills could affect their bargains."[188] Bell Atlantic argued that if the Commission permitted cable-affiliated programming vendors to charge new MVPDs more for programming than these same programming vendors charge affiliated cable operators under existing contracts, it "would give cable-affiliated programmers a broad license to discriminate against competing multichannel distributors for years into the future -- the precise practice that Congress prohibited in the 1992 Cable Act."[189]

86. DirecTV also opposed Time Warner's position arguing that it "would create a huge 'loophole' in the Commission's rules and thereby perpetuate cable's monopoly stranglehold on multichannel subscription programming for the indefinite future."[190] CSS contended that the Commission acted properly in applying the rules to existing contracts and that to delay the application of the rules until existing contracts have expired would frustrate the congressional purpose and result in significant continued harm for alternative media distributors.[191] Finally, WCA stated that there is no support in the statute or legislative history for Time Warner's argument that all existing contracts are beyond the reach of Section 628.[192]

87. Time Warner replied[193] that the rule has a severe and unreasonable impact on programming vendors:

> a programming vendor that, upon launch, entered into a long-term affiliation agreement at a low price as an inducement to obtain carriage is deprived of the ability to capitalize upon increased demand for its product as an established service (when it

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[187] Superstar's Opposition at 18-19.

[188] GTE Opposition at 10-11.

[189] Bell Atlantic Comments at 3; *see also* Bell Atlantic Reply at 2-3.

[190] DirecTV's Opposition at 7.

[191] CSS's Opposition at 2.

[192] WCA Opposition at 13.

[193] Time Warner Reply at 6.

can obtain carriage at a higher price.)[194]

88. *Discussion*. The Commission rejects Time Warner's petition and affirms its determination in the *First Report and Order* that the rules under Section 628 apply prospectively to existing contracts. Indeed, given the long-term nature of many programming agreements, Time Warner's position would delay for an unacceptable length of time the relief expected from the program access rules. As stated in the *First Report and Order*, "we believe that Congress would not have expressly grandfathered only a narrow class of contracts in Section 628(h) had it intended to generally exempt all existing contracts from the scope of the anti-discrimination requirements of Section 628."[195]

VII. SUBDISTRIBUTION AGREEMENTS

89. *Background*. Subdistribution agreements are sales agreements that are "generally between a programming vendor and a franchised cable operator, through which a MVPD competitor is required to purchase the vendor's programming from the franchised operator because the vendor had sold it the subdistribution rights related to its franchise area."[196]

90. In the *First Report and Order*, the Commission restated its concern, previously noted in the 1990 Competition Report, that in either served or unserved areas a distributor's access to programming may be impaired through the use of subdistribution agreements.[197] While the Commission acknowledged that granting subdistribution rights can be a legitimate practice for a programming vendor, the Commission stated that "we must address any incentives for a subdistributor to refuse to sell to a competing MVPD that may be inherent in such rights."[198] Thus, the Commission adopted Section 76.1002(c)(3) as "appropriate safeguards to limit the potential for anticompetitive behavior":

> (3) *Specific arrangements: Subdistribution agreements.---(i) Unserved area.* No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable

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[194] Discovery and Viacom similarly sought to limit the application of the rules to existing contracts.

[195] *First Report and Order*, 8 Fcc Rcd at 3415.

[196] *See First Report and Order*, 8 FCC Rcd at 3387 n.92 (citing the 1990 Cable Report, 5 FCC Rcd at 5021).

[197] *Id.*

[198] *Id.* at 3387.

programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.

(ii) *Served areas.* No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, with respect to areas served by a cable operator, unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)(iii) of this section.

(iii) *Limitations on subdistribution agreements in served areas.* No cable operator engaged in subdistribution of satellite cable programming or satellite broadcast programming may require a competing multichannel video programming distributor to

> (A) Purchase additional or unrelated programming as a condition of such subdistribution; or
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> (B) Provide access to private property in exchange for access to programming. In addition, a subdistributor may not charge a competing multichannel video programming distributor more for said programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge. Any cable operator acting as a subdistributor of satellite cable programming or satellite broadcast programming must respond to a request for access to such programming by a competing multichannel video programming distributor within fifteen (15) days of the request. If the request is denied, the competing multichannel video programming distributor must be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor.

91. *Nonexclusive Subdistribution Agreements in Served and Unserved Areas.* Time Warner petitioned the Commission to clarify that Section 76.1002(c)(3) applies only to exclusive arrangements.[199] Time Warner contended that this rule, which prohibits subdistribution arrangements in unserved areas, could be read to encompass both exclusive and nonexclusive subdistribution arrangements.[200] Time Warner stated that subdistribution

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[199] Time Warner's Petition at 2-5.

[200] *Id.* at 2.

agreements can have anticompetitive potential only if they are exclusive.[201] Time Warner contended that, by forbidding nonexclusive agreements for subdistribution in areas not served by a cable operator, the rule may have the effect of hindering rather than promoting access to programming, because subdistribution can be the most efficient way of selling programming to small distributors.[202] Finally, Time Warner stated that, from the *First Report and Order*, it does not appear that the Commission intended to regulate nonexclusive subdistribution arrangements. Time Warner noted that the *First Report and Order* only discussed concerns for exclusive arrangements in unserved areas.[203] Time Warner's petition on this issue is unopposed.

92. *Discussion.* The Commission will grant, in part, Time Warner's petition. The Commission agrees with Time Warner that there is no need to prohibit all subdistribution arrangements in areas unserved by cable, as long as no cable operator has exclusive subdistribution rights in unserved areas and, thus, a MVPD would have a choice of outlets for its programming needs. Indeed, as the Commission noted in the *First Report and Order*, subdistribution arrangements in both served and unserved areas can be an efficient and beneficial tool for program distribution.[204] This position is reflected in Section 76.1002(c)(3)(ii) and (iii) which, as originally drafted, require, among other things, a programming vendor to negotiate directly with a distributor if a subdistributor in a served

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[201] *Id.* at 3. Time Warner gives the example of Home Box Office ("HBO") which has had a policy of authorizing cable operators to subdistribute its programming services to Satellite Master Antenna Television ("SMATV") operators within their franchise areas. According to Time Warner, HBO leaves SMATV operators free to obtain programming from alternative sources.

[202] *Id.* at 4.

[203] *Id.* at 4 (citing *First Report and Order*, 8 FCC Rcd at 3387, 3390). Time Warner proposes that, in order to clarify that Section 76.1002(c)(3) applies only to exclusive arrangements, the Commission could make the rules applicable to served areas also applicable to unserved areas. Those rules require a programming vendor to negotiate directly with a distributor if a subdistributor denies the distributor's request for access to programming. Time Warner proposes that Section 76.1002(c)(3)(i) could be deleted and the references to "served areas" in Section 76.1002(c)(3)(ii) and (iii) also could be deleted.

[204] *First Report and Order*, 8 FCC Rcd at 3387. Indeed in the *First Report and Order*, the Commission acknowledged that subdistribution agreements can be a legitimate practice for a programming vendor. We allowed such agreements to exist, subject to conditions which would limit anticompetitive behavior. The applicable paragraphs relating to both served and unserved areas come under the heading "Issues Applicable to Both Served and Unserved Areas," thus indicating that any limitations on subdistribution agreements should apply to both served and unserved areas.

area denies the distributor's request for access to programming. This requirement is intended to make all subdistribution agreements in served areas nonexclusive. Similarly, Section 76.1002(c)(3)(iii) should apply to subdistribution agreements in unserved areas. The Commission will therefore amend the implementing rules, as suggested by Time Warner, to clarify that nonexclusive subdistribution agreements in both served and unserved areas are treated consistently and subject to the protections provided by the requirements of Section 76.1002(c)(3)(iii).

VIII. *DE MINIMIS* PRICE DIFFERENTIAL/SIMILARLY SITUATED COMPARISON

93. *Background.* In the *First Report and Order*, the Commission discussed complaint and enforcement procedures regarding discrimination. The Commission determined that, in an effort to conserve Commission resources and avoid the need for discovery and protracted adjudication solely to resolve accounting issues, "in those cases in which the differential between the complainant's price and that of its competitor is equal to or less than five cents per subscriber or five percent, whichever is larger, we will not require the vendor to justify the magnitude of the differential so long as it provides sufficient reasons that are justified by the statutory factors for a difference in price."[205] In making this finding, the Commission assumed that, as long as a programming vendor identifies sufficient factors for legitimate price differentials, such small magnitudes are presumptively justifiable.

94. In the *First Report and Order*, the Commission further determined that, although an MVPD can bring a discrimination claim merely by demonstrating that another MVPD with which it does or proposes to compete has received more favorable terms from the vertically integrated programming vendor, the competing MVPD identified by the complainant may not be a proper point of comparison because of the presence of any one of a number of factors that the 1992 Cable Act recognizes as legitimate bases for price differentials. Thus, under the program access rules, a "discriminatory practice must involve the offering of the program service to similarly-situated distributors."[206] Therefore, in justifying the price, terms and conditions of a contract, a programming vendor may demonstrate that the proper comparison is between the complainant and a similarly-situated distributor, rather than the complainant and its competitor.[207]

95. The Commission promulgated § 76.1003(d)(6) which provides, in part:

(6) An answer to a discrimination complaint shall state the reasons for any

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[205] *Id.* at 3420.

[206] *Id.* at 3401.

[207] *Id.* at 3401-02.

differential in prices, terms or conditions between the complainant and its competitor, and shall specify the particular justification set forth in § 76.1002(b) relied upon in support of the differential.

. . .

(ii) In cases involving a price differential of less than or equal to five cents per subscriber or five percent, whichever is greater, the answer shall identify the differential as *de minimis* and state that the defendant is therefore not required to justify the magnitude of the differential.

(iii) If the defendant believes that the complainant and its competitor are not sufficiently similar, the answer shall set forth the reasons supporting this conclusion, and the defendant may submit an alternative contract for comparison with a similarly situated multichannel video programming distributor that uses the same distribution technology as the competitor selected for comparison by the complainant. The answer shall state the defendant's reasons for any differential between the prices, terms and conditions between the complainant and such similarly situated distributor, and shall specify the particular justifications in §76.1002(b) relied upon in support of the differential

. . . .

96. *Similarly- Situated Price Comparisons.* Viacom requested clarification that, under Section 76.1003(d), once a programming vendor has demonstrated that the proper course is to compare the complainant with a "similarly-situated" distributor, the determination of whether the price differential is *de minimis* similarly should be made by comparing the price charged or offered to the complainant with the price charged to the similarly-situated distributor.[208] In response to Viacom's petition, DirecTV contended that "the Commission should be wary of taking any action that undercuts the touchstone of allowing alternative MVPDs fair access to programming at rates that are competitive to those offered to cable providers. To the extent that Viacom's proposal is contrary to this fundamental objective of the 1992 Cable Act, it must be rejected by the Commission."[209]

97. *Discussion.* We hereby grant Viacom's request, and clarify that, under Section 76.1003(d), once a programming vendor has persuaded the Commission that a "similarly-situated" competitor is the proper focus for comparison, the same rationale would apply with respect to making a determination as to whether the price differential is *de minimis*. That is, the price charged or offered to the complainant will be compared to the price charged to the similarly-situated distributor. As noted above, the rationale underlying the less onerous burden of proof for *de minimis* price differentials are administrative and

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[208] Viacom Petition at 10.

[209] DirecTV Opposition at 12.

related to "efforts to conserve Commission resources and avoid the need for discovery and protracted adjudication aimed solely at resolution of accounting issues."[210]

IX. BUYING GROUPS

98. *Background.* Section 628(c)(2)(B) of the 1992 Cable Act sets forth factors upon which a vertically integrated programming vendor may justify differences in the prices, terms and conditions of sale or delivery of programming to cable operators, MVPDs or their agents, or buying groups.[211] Section 628(c)(2)(B)(iii) states that these entities are not prohibited from:

> establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor. . . .[212]

99. In the *First Report and Order*, the Commission noted that buying groups can offer some economies of scale or other efficiencies to programming vendors which would justify price discounts under the statute. However, the Commission stated that "in order to benefit from treatment as a single entity for purposes of subscriber volume, a buying group should offer vendors similar advantages or benefits as a single purchaser, including for example, some assurance of satisfactory financial and technical performance." [213] Accordingly, the Commission adopted regulations that included, among other things, requirements that a buying group seeking unitary treatment from a programming vendor must agree to be financially responsible for any fees due under a contract to which it is a party.[214] In addition, the Commission required that, if individual members are contracting parties, each member must agree to joint and several liability for commitments of the group. [215]

100. These requirements were promulgated in Section 76.1000(c), which defines buying groups as follows:

> Buying groups. The term "buying group" or "agent" . . . means an

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[210] *First Report and Order*, 8 FCC Rcd at 3420.

[211] 47 U.S.C. § 548(c)(2)(B).

[212] 47 U.S.C. § 548(c)(2)(B)(iii).

[213] *First Report and Order*, 8 FCC Rcd at 3411.

[214] *First Report and Order*, 8 FCC Rcd at 3412.

[215] *Id.* at 3412.

entity representing the interests of more than one entity distributing multichannel video programming that:

(1) Agrees to be financially liable for any fees due pursuant to a satellite cable programming, or satellite broadcast programming, contract which it signs as a contracting party as a representative of its members or whose members, as contracting parties, agree to joint and several liability; and

(2) Agrees to uniform billing and standardized contract provisions for individual members . . . .

101. Liberty Media argued that the definition of "buying group" in Section 76.1000(c) offers little or no assurance that such buying group is capable of satisfying its financial obligations.[216] Liberty Media argued that Section 76.1000(c)(1) provides that the members of a buying group may, "as contracting parties, agree to joint and several liability" in any contract between the buying group and a programming vendor. Liberty Media argued that the definition, however, "also permits the buying group to agree 'to be liable for any fees due pursuant to a . . . contract which it signs as a contracting party as a representative of its members' ".[217] According to Liberty Media, there is no incentive for members of a buying group to agree to joint and several liability when they can shift all liability to the corporate entity acting as the buying group.[218] Liberty Media stated that programming vendors should be permitted to require the members of such buying group(s) to guarantee payment or to agree to joint and several liability.[219] Liberty Media's petition was unopposed.

102. United Video contended that it is critical for the Commission to re-evaluate its treatment of buying groups and "to set strict standards for such groups in order to prevent the formation of sham buying groups that will undermine the entire rate structures of satellite programming vendors."[220] United Video stated that it supports the position that "buying groups must be able to demonstrate at the time service is requested that they are capable of satisfying the group's financial obligations by permitting the satellite programming vendors to require the group members to guarantee payment or to agree to joint and several liability. At a minimum, the Commission should require that buying groups document to the satellite programming vendors at the time service is requested that they comply with all of the

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[216] Liberty Media Petition at 14.

[217] *Id.* at 15.

[218] *Id.*

[219] *Id.*

[220] United Video Opposition at 7.

standards set forth in Section 76.1000(c) of the Commission's rules."[221]

103. *Discussion*. In the *First Report and Order*, the Commission recognized that programming vendors may have legitimate concerns about the creditworthiness or financial stability of their customers. We stated that vendors are permitted to create a distinct class or classes of service in pricing to reflect these concerns; however, any distinctions based on considerations of creditworthiness must be applied on a technology-neutral basis.[222] With respect to the creditworthiness or financial stability of buying groups, we reject petitioner's request that we require the individual members to agree to joint and several liability for the entire commitment of the group. We believe that such a requirement might, as a practical matter, prevent small MVPDs from establishing buying groups at all. Accordingly, we will affirm Section 76.1000(c) as adopted. However, to address the concerns raised by the petitioning parties, we will clarify that, in those situations where a seller has reasonable doubts about the financial stability and responsibility of the buying group, it may insist on appropriate assurances of creditworthiness. Buying groups could satisfy this burden through various measures, such as requiring each individual member of the group to guarantee to the group its pro rata share of the fees due under a programming contract.

X. COMPETING DISTRIBUTORS

104. *Background*. Section 628(c)(2)(B) of the 1992 Cable Act requires the Commission to adopt regulations which prohibit discrimination in the prices, terms, and conditions of sale or delivery of programming.[223] In the *First Report and Order*, the

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[221] United Video Opposition at 7-8 (original emphasis deleted; new emphasis added).

[222] *First Report and Order*, 8 FCC Rcd at 3408.

[223] 47 U.S.C. § 548(c)(2)(B). Section 628(c)(2)(B) provides that the Commission shall "prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale and delivery of satellite cable programming or satellite broadcast programming among or between cable systems, or other multichannel video programming distributors, or their agents or buying groups; except that such satellite cable programming vendor in which a cable operator has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from---

> (i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;
>
> (ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming;

Commission determined that, "when addressing a Section 628 complaint, we will require a complainant to demonstrate that it has been offered or is paying a higher price, or has received less favorable terms, than a competing distributor."[224] We also stated that:

> in establishing that another distributor is a competitor for these purposes, we will require that there be some overlap in actual or proposed service area. Moreover, the geographic market for assessing whether distributors compete with each other (actually or potentially) can be local, regional or national, depending on how the distributor buys and distributes programming.[225]

105. Viacom and Discovery petitioned the Commission to require cable operators bringing complaints of discrimination to show a substantial (at least 50%) overlap with the service area of a competing MVPD.[226] Viacom and Discovery argued that Congress determined "that distributors using alternative technologies may have been subject to certain practices designed to limit their ability to compete with cable operators;"[227] and that the Commission propounded an expansive definition of "competing distributor" to make it easier for alternative technology distributors to bring complaints of discrimination.[228] Petitioners argued that the Commission's broad definition of competing distributor should not be available to cable operators. Viacom and Discovery further argued that to do so "would allow a cable operator who has entered into an agreement with a programming vendor on an arms-length basis and then found that a neighboring cable operator has been able to negotiate more favorable terms, to get out from under its bargain merely by "overbuilding"...a small portion of that neighboring system and bringing a complaint under the rules ... the complainant cable operator would be able to obtain terms that it was unable to negotiate in the open marketplace."[229]

> (iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by a distributor; or
>
> (iv) entering into an exclusive contract that is permitted under subparagraph (D).

[224] *First Report and Order*, 8 FCC Rcd at 3400.

[225] *Id.* at 3400

[226] Discovery Petition at 6; Viacom Petition at 12

[227] Discovery Petition at 4-5; Viacom Petition at 11.

[228] Discovery Petition at 5; Viacom Petition at 11.

[229] Discovery Petition at 5-6; Viacom Petition at 11-12.

106. PrimeTime 24 Joint Venture ("PrimeTime") supported the petitions filed by Viacom and Discovery and requested that the Commission clarify the definition of competing distributor for both non-cable and cable distributors.[230] PrimeTime 24 argued that the danger of misapplication also could apply to comparisons involving non-cable distributors.[231] Landmark also supported clarification of the Commission's definition of competing distributor and suggested that any distributor seeking to file a complaint must demonstrate a substantial (at least 50%) overlap.[232] No oppositions were filed to these petitions.

107. *Discussion*. The Commission does not find that a change in the definition of a competing distributor is necessary or justified. The program access provisions of the 1992 Cable Act were intended to protect the nascent development of competition to incumbent cable operators. As noted in the *First Report and Order*, the legislative history recounts the difficulties encountered by non-cable distributors. However, Congress did not differentiate among the technologies used by competitors in the program access provisions, but rather sought "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market."[233] Petitioners' concern that cable operators will avoid their contractual obligations by bringing a price discrimination complaint without actually competing can be addressed in the adjudicatory process. Moreover, the statute and the Commission's rules allow a defendant programming vendor to substitute another distributor, with attributes similar to the complainant, for a comparison to justify its contract terms.[234] Thus, where the substitution shows that there is no price differential between competitors for the programming vendor's service, the cable operator will not be able to renege on its contractual obligations.

108. Moreover, as the responses to Viacom's and Discovery's petitions illustrate, the concern of misapplication raised in the petitions is not limited to cable distributors alone. Thus, the Commission would not be justified in limiting the requirement for a substantial overlap between competing distributors to cable operators' complaints. The Commission believes that to restrict an MVPD's ability to bring a complaint by requiring a substantial overlap is contrary to the intention of the program access provisions.

XI. CLARIFYING THE FIRST REPORT AND ORDER

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[230] PrimeTime 24 Comments at 2.

[231] *Id.* at 3.

[232] Landmark Reply at 10.

[233] Communications Act § 628(a), 47 U.S.C. §548(a).

[234] *First Report and Order*, 8 FCC Rcd at 3401. *See also* Section IV.E. *supra*.

109. On our own motion, we take the opportunity in this Order to emphasize certain procedural requirements under the program access rules and clarify the discussion of those requirements in the *First Report and Order*.[235] The Commission initially notes that the actual rules that set forth the procedural requirements for program access complaints are clear that they apply both to Section 628(b) and Section 628(c) cases.[236] However, these procedural requirements are not consistently discussed throughout the text of the *First Report and Order*. The Commission emphasizes here that these procedural requirements are applicable to every type of program access complaint.

110. For example, the *First Report and Order* discusses the requirement set forth in the rules that prior to filing a complaint, the complainant must notify the opposing party of its intention to file a complaint.[237] This pre-complaint notice provision is applicable to all program access complaints. Similarly, the *First Report and Order* discusses the one year "statute of limitations" within which to bring complaints. [238] This one year limit is applicable to all types of program access complaints. In addition, the *First Report and Order* discusses the contents of program access complaints and states that they must specify the relief requested.[239] This requirement is applicable to all program access complaints.

XII. REGULATORY FLEXIBILITY ACT ANALYSIS

111. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Sections 601-602, the Commission's final analysis is as follows:

112. Need and purpose of this action: This action is taken to address petitions for reconsideration of the program access rules adopted by the Commission to implement Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (the 1992 Cable Act).

113. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis: There were no comments submitted in response to the Initial

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[235] *See* 47 C.F.R. §1.108.

[236] 47 C.F.R. § 76.1003(a)-(s).

[237] *See First Report and Order*, 8 FCC Rcd at 3416, 3422, 3424. In addition, the general Complaint and Enforcement Procedures contain a notice requirement provision. *Id.* at 3389.

[238] *Id.* at ¶¶ 3416, 3422, 3425. There also is a one year statute of limitations set out in the general Complaint and Enforcement Procedures. *Id.* at 3389.

[239] *Id.* at 3389, 3422, 3425.

Regulatory Flexibility Analysis.

114. Significant alternatives considered: We have analyzed the comments submitted in light of our statutory directives and have formulated regulations which, to the extent possible, minimize the regulatory burden placed on entities covered by the program access provisions of the 1992 Cable Act.

115. Federal Rules which overlap, duplicate or conflict with these rules: None.

XIII. PAPERWORK REDUCTION ACT:

116. Paperwork Reduction Act Statement: The proposal contained herein has been analyzed with respect to the Paperwork Reduc: . Act of 1980. The modifications that will be made to the rules will not increase and in some instances will decrease the information collection requirements on the public.

XIV. EFFECTIVE DATE

117. The changes to the regulations established in this *Memorandum Opinion and Order on Reconsideration of the First Report and Order* will become effective thirty days (30) after publication in the Federal Register.

XV. ORDERING CLAUSE

118. Accordingly, IT IS ORDERED, that the Petitions for Reconsideration are GRANTED IN PART and DENIED IN PART, as indicated above.

119. IT IS FURTHER ORDERED that Part 76 of the Commission's Rules. 47 U.S.C. Part 76, IS AMENDED, as set forth in Appendix A.

For additional information regarding this proceeding, contact, Nancy Markowitz, Cable Services Bureau (202) 416-1130.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary.

APPENDIX A

Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

Part 76 Cable Television Service

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 552 as amended, 106 Stat. 1460.

2. Section 76.1003(h) is amended by adding a new paragraph (3) and by revising the remaining paragraphs in this Section to read as follows:

§ 76.1003 Adjudicatory Proceedings

* * * * *

(h) **Confidentiality of proprietary information.**

(1) Any materials generated or provided by a party in connection with the pre-complaint notification procedure required under § 76.1003(a) and in the course of adjudicating a program access complaint under this provision may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality will have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

(2) Except as provided in paragraph (3) below, materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(i) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys:

(ii) Officers or employees of the opposing party who are

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named by the opposing party as being directly involved in the prosecution or defense of the case;

(iii) Consultants or expert witnesses retained by the parties;

(iv) The Commission and its staff; and

(v) Court reporters and stenographers in accordance with the terms and conditions of this section.

(3) The Commission will enter an, subject to a proper showing, a party's request to further restrict access to proprietary information as specified by the party. The opposing party will have an opportunity to respond to such requests.

(4) The persons designated in paragraphs (h)(2) and (3) of this section shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information by the opposing party shall sign a notarized statement affirmatively stating, or shall certify under penalty of perjury, that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(5) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraphs (h) (2) or (3) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(6) Upon termination of the complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

3. Section 76.1002(c)(3) is amended by deleting (c)(3)(i) and revising (c)(3)(ii) and (c)(3)(iii) to read as follows:

§ 76.1002 Specific Unfair Practices Prohibited

* * * * *

(c) **Exclusive contracts and other practices and arrangements.**

* * * * *

(3) **Specific arrangements: subdistribution agreements.**

(i) **Unserved and served areas**. No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, with respect to areas served or unserved by a cable operator, unless such agreement or arrangement complies with the limitations set forth in paragraph (c) (3) (ii) of this section.

(ii) **Limitations on subdistribution agreements.** No cable operator engaged in subdistribution of satellite cable programming or satellite broadcast programming may require a competing multichannel video programming distributor to

(A) Purchase additional or unrelated programming as a condition of such subdistribution; or

(B) Provide access to private property in exchange for access to programming. In addition, a subdistributor may not charge a competing multichannel video programming distributor more for said programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge. Any cable operator acting as a subdistributor of satellite cable programming or satellite broadcast programming must respond to a request for access to such programming by a competing multichannel video programming distributor within fifteen (15) days of the request. If the request is denied, the competing multichannel video programming distributor must be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor.

APPENDIX B

Petitions for Reconsideration of First Report and Order in MM Docket No. 92-265, 8 FCC Rcd 3359 (1993)

Black Entertainment Television
Caribbean Satellite Network
Discovery
Liberty Media
National Rural Telecommunications Cooperative
Time Warner
Viacom
Wireless Communications Association International
WJB-TV Fort Pierce Limited Partnership

Comments/Oppositions to Petitions for Reconsideration

Bell Atlantic
Consumer Satellite Systems
Consumers Federation of America
DirecTv
Discovery
Group W Satellite Communications
GTE Service Corporation
Liberty Cable
Liberty Media
Primetime 24
Sunshine Network
Superstar
Time Warner
United States Satellite Broadcasting Company, Inc.
United Video
Viacom
Wireless Communications Association International

Replies to Oppositions to Petitions for Reconsideration

Bell Atlantic
Black Entertainment Television
DirecTv
Discovery
Landmark

Liberty Media
Lifetime Television
National Rural Telecommunications Cooperative
Superstar Connection
Time Warner
United States Telephone Association
Viacom
Wireless Communications Association International

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265 (Program Access; Memorandum Opinion and Order)

In this Memorandum Opinion and Order, the Commission has acted on various petitions for reconsideration of the First Report and Order regarding the rules implementing the program access provisions of the 1992 Cable Act. Those provisions, contained in Section 628 of the Communications Act, prohibit unfair or discriminatory practices in the sale of video programming by vertically integrated cable operators. Section 628 was intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems by governing the access of competing multichannel video systems to cable programming services. While the Commission generally has affirmed its initial rules that implemented the program access provisions, the Commission has modified its prior decision to determine that it does have the authority under Section 628 to award damages for violations of the program access rules, but that creating such a remedy for violations of the program access rules is not necessary at this time.

I write separately on this matter to emphasize the policy considerations that, in my estimation, make awards of damages as a remedy to violations of the program access rules unnecessary, apart from the question of whether Section 628 allows the authority to award such damages. Furthermore, I am concerned that a decision to award damages for violations of the program access rules, even if limited to certain instances or categories of violations, could constitute a step to undermine the framework and enforcement processes that the Commission has adopted to implement the program access provisions of the 1992 Cable Act.

In particular, to the extent that the Commission's rules in implementing the program access provisions of Section 628 will not always require showings of "harm", I question how the Commission could determine appropriate damages in the absence of a showing of harm. Second, the Commission's program access rules and enforcement process are based on a measure of flexibility in identifying violations, and case-by-case analysis of complaints in an expedited process. In addition, the Commission's rules apply a range of justifying factors for pricing differentials in order to distinguish legitimate practices by programming vendors in selling programming from "unfair" or "discriminatory" practices that would constitute violations of the program access rules. Based on my prior concerns regarding a potential flood of frivolous

complaints,[1] I am concerned that a process necessary to determine damages could become incompatible with the rules and enforcement process for program access while introducing an unnecessary element of confusion, and might serve as an unintended incentive for parties to file complaints. In this regard, it is important to observe that the Commission has recently stated that the program access rules have facilitated increased competition in the video marketplace and that a relatively small number of complaints have been filed with the Commission concerning the denial of access to programming on the grounds of exclusivity agreements.[2] Finally, I believe that a decision to reverse the Commission's prior decision not to award damages, without a clear basis for determining such damages, could become yet another source of uncertainty in the multichannel video marketplace and limit investment in programming vendors.

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[1] See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, 8 FCC Rcd 3359 (1993)(Separate Statement of Commissioner Andrew C. Barrett).

[2] See In the Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 94-48 (September 28, 1994) at para. 173.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

DA 94-1421

In the Matter of	)	
	)	CC Docket No. 94-97
	)	
Ameritech Operating Companies	)	
Revisions to Tariff F.C.C. No. 2	)	Transmittal No. 819
	)	
Bell Atlantic Telephone Companies	)	
Revisions to Tariff F.C.C. No. 1	)	Transmittal No. 692
	)	
BellSouth Telecommunications, Inc.	)	
Revisions to Tariff F.C.C. No. 1	)	Transmittal Nos. 223, 233, 244
	)	
Cincinnati Bell Telephone Company	)	
Revisions to Tariff F.C.C. No. 35	)	Transmittal Nos. 662, 670
	)	
GTE System Telephone Companies	)	
Revisions to Tariff F.C.C. No. 1	)	Transmittal Nos. 107, 116, 128
	)	
GTE Telephone Operating Companies	)	
Revisions to Tariff F.C.C. No. 1	)	Transmittal Nos. 905, 917, 934
	)	
Southwestern Bell Telephone Company	)	
Revisions to Tariff F.C.C. No. 73	)	Transmittal Nos. 2383, 2388,
	)	2392, 2397, 2407
United and Central Telephone Companies	)	
Revisions to Tariff F.C.C. No. 1	)	Transmittal No. 16
	)	
U S West Communications, Inc.	)	
Revisions to Tariff F.C.C. No. 5	)	Transmittal Nos. 531, 537, 539, 549

ORDER

Adopted: December 9, 1994 ; Released: December 9, 1994

By the Chief, Common Carrier Bureau:

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I. INTRODUCTION

1. On September 1, 1994, the above-captioned Tier 1 local exchange carriers (LECs)[1] filed permanent tariffs offering expanded interconnection through virtual collocation for special access and switched transport services.[2] These tariffs are currently scheduled to become effective on December 15, 1994. Based on our analysis of the record, we find that the LECs' permanent virtual collocation tariffs raise significant questions of lawfulness regarding cost allocations, rate levels, rate structures, and terms and conditions of service that warrant suspension for one day, investigation, and imposition of an accounting order. In addition, we find it necessary to take immediate action regarding certain key issues, such as

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[1] These LECs are listed in Appendix A. The abbreviations for the LECs as indicated in the Appendix are used throughout this Order. In most instances, GTOC and GSTC are referred to collectively as GTE.

[2] As described below, the LECs also filed on September 1, 1994 interim tariffs that were identical in substance to the permanent virtual collocation tariffs. See paragraphs 6-7, infra.

the level of most LECs' proposed overhead loadings for virtual collocation. Based on the current record, we conclude that most LECs have failed to justify their proposed overhead loadings as reasonable under the standard set forth in the Commission's Virtual Collocation Order.[3] We also conclude that based on the record before us, Bell Atlantic's maintenance-related charges appear excessive. Because it appears that most LECs' proposed overhead loadings and Bell Atlantic's maintenance-related charges are unreasonable, we conclude that most of the LECs' rates for virtual collocation are likely to be unreasonably high.

2. To prevent apparently excessive rates from becoming effective while we investigate the LECs' overall proposed rate levels, we partially suspend those rates that appear unreasonable during the remainder of the five-month suspension period pursuant to our authority under Section 204(a) of the Communications Act, 47 U.S.C. § 204(a). Our partial suspension will permit rates that do not appear to be unreasonable to become effective, subject to an investigation and an accounting order, but will prevent apparently unreasonable rates from taking effect while we investigate all of the LECs' overall rate levels. Therefore, our action should ensure that expanded interconnection is available, without interruption, at rate levels that will promote economically efficient competition during the pendency of our investigation. We also reject certain patently unlawful terms and conditions proposed by several LECs, and order certain of the LECs to make other tariff revisions.

3. We will address the other issues that have been raised in a subsequent order. Because the permanent virtual collocation tariffs are identical in substance to the interim virtual collocation tariffs currently subject to investigation in CC Docket No. 94-97, we will consolidate our investigation of the permanent virtual collocation tariffs with the investigation initiated in the interim tariff docket. Our subsequent order will designate specific issues relating to both sets of tariffs and establish a pleading cycle for discussion of those issues. As part of the investigation initiated in this order, LECs may be required to make additional showings, to be specified in our designation order.

II. BACKGROUND

4. On July 25, 1994, the Commission released its Virtual Collocation Order in response to the June 10, 1994 decision of the United States Court of Appeals for the District of Columbia (D.C.) Circuit in Bell Atlantic v. FCC.[4] In Bell Atlantic v. FCC, the Court stated that it would vacate in part the first two of the Commission's expanded interconnection

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[3] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994), appeal docketed sub nom., Southwestern Bell Telephone Company v. FCC, Case No. 94-1547 (D.C. Cir. Aug. 10, 1994) (Virtual Collocation Order).

[4] Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) (Bell Atlantic v. FCC).

orders[5] on the grounds that the Commission did not have authority under the Communications Act of 1934, as amended, to require Tier 1 LECs to provide expanded interconnection through physical collocation.[6] The Court also stated that it would remand the Commission's orders to permit the Commission to consider whether and to what extent to impose virtual collocation requirements in the absence of a physical collocation requirement.[7]

5. The Virtual Collocation Order adopted virtual collocation as the basic architecture for providing expanded interconnection and directed Tier 1 LECs (other than National Exchange Carrier Association pool members) to provide expanded interconnection for both interstate special access and switched transport through generally available virtual

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[5] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (Special Access Physical Collocation Order), recon., 8 FCC Rcd 127 (1992) (First Reconsideration Order), vacated in part and remanded sub nom. Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994), recon., 8 FCC Rcd 7341 (1993) (Second Reconsideration Order). See also Expanded Interconnection with Local Telephone Company Facilities, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993) (Switched Transport Physical Collocation Order), pet. for review pending sub nom. Southwestern Bell Telephone Co. v. FCC, No. 94-1547 (D.C. Cir. Aug. 10, 1994).

[6] In the Special Access Physical Collocation Order, the Commission mandated expanded interconnection through physical collocation, except in limited instances upon Commission approval. The Commission required virtual collocation where physical collocation was not provided, as well as in certain other circumstances. See Special Access Physical Collocation Order, 7 FCC Rcd at 7389-91.

[7] Bell Atlantic v. FCC, 24 F.3d at 1447. Expanded interconnection is a LEC offering that enables parties, by interconnecting their circuits with those of the LEC at a LEC central office through either physical collocation or virtual collocation, to compete on a facilities basis with certain LEC access services. Expanded interconnection through physical collocation is an offering that enables an interconnector to locate its own transmission equipment in a segregated portion of a LEC central office. The interconnector pays a tariffed charge to the LEC for the use of that central office space in which to terminate its transmission links, and may enter the central office to install, maintain, and repair the collocated equipment. Expanded interconnection through virtual collocation is an offering in which the LEC owns (or may lease) and exercises exclusive physical control over the transmission equipment, located in the central office, that terminates the interconnector's circuits. The interconnector has the right to designate its choice of central office equipment, and the LEC dedicates this equipment to the exclusive use of the interconnector. The interconnector pays a tariffed charge to the LEC for virtual collocation services using the dedicated equipment. The LEC provides installation, maintenance, and repair of dedicated equipment on a non-discriminatory basis. See Virtual Collocation Order, 9 FCC Rcd at 5158.

collocation services.[8] The Commission exempted LECs from the mandatory virtual collocation requirement in central offices at which they choose to provide physical collocation under tariff, subject to non-streamlined regulation as a communications common carrier service.[9] The Virtual Collocation Order required non-exempt LECs to file tariffs offering virtual collocation service on September 1, 1994, to be effective on December 15, 1994.[10] In the Tariff Review Plan Order released concurrently with the Virtual Collocation Order, the Common Carrier Bureau (Bureau) instructed LECs to file certain cost support data in connection with all of their rates for virtual collocation.[11]

6. In conjunction with the Virtual Collocation Order, the Commission and the Tier 1 LECs reached an agreement on August 9, 1994 to facilitate an orderly transition to the Commission's mandatory virtual collocation regime. This agreement formed the basis for the D.C. Circuit's partial stay of the Bell Atlantic v. FCC mandate until December 15, 1994.[12] Pursuant to the agreement, the Tier 1 LECs agreed to file on September 1, 1994, "interim" virtual collocation tariffs that were identical in substance to the permanent virtual collocation tariffs to be filed on that same date. These interim tariffs were designed to serve the public interest by permitting interconnectors to continue to receive, on an uninterrupted basis, tariffed expanded interconnection service during the period between the effectiveness of the interim tariffs and the date the permanent virtual collocation tariffs become effective.[13]

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[8] Virtual Collocation Order, 9 FCC Rcd at 5156.

[9] Id. at 5156, 5166-67.

[10] Id. at 5156, 5167-68. The Commission stated that December 15 was the earliest date by which the Commission could ensure that these tariffs would have undergone adequate review by the Commission's staff. To prevent any lapse in the effectiveness of its overall expanded interconnection policy, the Commission stated its intention to ask the D.C. Circuit to stay the issuance of its mandate until December 15, 1994, by which time tariffs implementing the new virtual collocation rules could become effective. Id. at 5156.

[11] Commission Requirements for Cost Support Material To be Filed with Virtual Collocation Tariffs for Special Access and Switched Transport, Tariff Review Plan Order, 9 FCC Rcd 5679 (Com. Car. Bur. 1994) (Tariff Review Plan Order).

[12] See Letter from Mark L. Evans, Esq. on behalf of the Tier 1 LECs to William E. Kennard, Esq., General Counsel, FCC (August 9, 1994) (Letter Agreement).

[13] See generally Letter Agreement.

7. On September 1, 1994, Tier 1 LECs subject to the mandatory virtual collocation requirement filed interim and permanent virtual collocation tariffs.[14] In these tariffs, the LECs took the first step in the equipment tariffing procedure outlined in the Virtual Collocation Order. That process was intended to ensure compliance with two basic requirements of the mandatory virtual collocation regime: that LECs offer virtual collocation using the type of transmission equipment reasonably requested by interconnectors, and that LECs offer virtual collocation through generally available tariffs. Pursuant to the Commission's equipment tariffing process, prospective users of virtual collocation equipment were permitted to request that LECs include in their tariffs rates for specific types of equipment that they were likely to use initially. LECs were required to include specific rates for equipment requested on or before August 1 in their September 1 tariff filings. By October 3, 1994, LECs were required to amend their initial tariffs to include specific rates for equipment identified by interconnectors after August 1, but no later than September 1, 1994.[15]

8. The Commission's equipment tariffing procedure was also designed to permit LECs and interconnectors to arrive jointly at reasonable purchase prices for interconnector-designated transmission equipment.[16] According to the Virtual Collocation Order, these purchase prices were to serve as the basis for the LECs' virtual collocation equipment rates. The Commission stated, however, that it did not intend to limit the LECs' ability to use financial arrangements other than purchasing equipment outright from third parties. The Commission therefore concluded that LECs, if they wish, may offer to purchase equipment from interconnectors for a nominal amount (e.g., $1), and make it available for resale to the interconnectors for the same amount. The Commission declined, however, to require that LECs offer such an arrangement.[17] In their virtual collocation tariffs most LECs adopted this

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[14] The other Tier 1 LECs subject to expanded interconnection requirements elected to provide physical collocation under tariff, subject to non-streamlined regulation as a communications common carrier service. These LECs, therefore, are exempt from the mandatory requirement for a general virtual collocation offering.

[15] Virtual Collocation Order, 9 FCC Rcd at 5171. The Commission specified that interconnectors may continue to specify equipment during the period from September 1 to December 15, but the LEC may treat such requests as if they were received on the day after the tariffs become effective. The Commission further stated that after the initial tariffs become effective, interconnectors may continue to specify additional types of equipment, and request that the LEC modify its tariff to include rates for such equipment. According to the Virtual Collocation Order, the LEC will be required to modify its tariff within 30 days of receiving a request, with the changes scheduled to become effective on 30 days notice. The Commission concluded that such a procedure would enable interconnectors to make rapid modifications to upgrade their networks -- thus encouraging technological progress. Id.

[16] See id at 5188.

[17] Id. at 5189.

type of "$1 sale and repurchase" arrangement. SWB, US West, and CBT based their rates on the prices of transmission equipment purchased directly from third-party vendors.[18]

9. On September 2, 1994, the Bureau released its Virtual Collocation Interim Tariff Suspension Order.[19] The Bureau concluded that based on its preliminary review, the interim tariffs raised significant questions of lawfulness that warranted suspension for one day, investigation, and imposition of an accounting order.[20] The interim tariffs became effective on September 4, 1994, subject to investigation, and are currently scheduled to be replaced by the permanent tariffs on December 15, 1994.[21]

10. Eight parties filed petitions against the LECs' virtual collocation tariffs on October 14, 1994.[22] The parties' petitions included requests that the Commission: (1) partially

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[18] CBT, however, states in its reply comments that it does not prohibit a $1 sale and repurchase arrangement. CBT Reply at 6-7. We note that US West accompanied its September 1 tariff filings with a petition for extension of time to complete its virtual collocation tariffs. US West stated that during the week of September 1, it expected to include specific rates for all requested virtual collocation equipment. US West Petition for Extension of Time at 3. On September 19, 1994, US West filed revisions to include rates for interconnector-designated equipment. Because we find that US West has demonstrated good cause for a short extension of time, we grant US West's petition for extension of time.

[19] See Ameritech Operating Companies et al., Order, CC Docket No. 94-97, 9 FCC Rcd 5230 (Com. Car. Bur. 1994) (Virtual Collocation Interim Tariff Suspension Order).

[20] Virtual Collocation Interim Tariff Suspension Order, 9 FCC Rcd at 5231. The Bureau stated that it would designate specific issues and establish a pleading cycle in a subsequent order. Id.

[21] Since September 4, 1994, SWB and BellSouth have filed revisions to their interim tariffs. The Bureau determined that these transmittals raised the same issues as the tariffs subject to the Virtual Collocation Interim Tariff Suspension Order, and therefore warranted suspension for one day, investigation, and imposition of an accounting order. See In the Matter of Southwestern Bell Telephone Company, Revisions to Tariff F.C.C. No. 73, Transmittal No. 2396, CC Docket No. 94-97, DA 94-1252, released Nov. 10, 1994; In the Matter of BellSouth Telecommunications, Inc., Revisions to Tariff F.C.C. No. 1, Transmittal No. 243, CC Docket No. 94-97, DA 94-1295, released Nov. 22, 1994.

[22] These petitioners and the LECs against which they filed are listed in Appendix B. The abbreviations for the parties as indicated in the Appendix are used throughout this Order. We note that some petitioners protested the interim virtual collocation tariffs in addition to the permanent virtual collocation tariffs.

reject some of the tariffs;[23] (2) completely reject some of the tariffs, and partially suspend most of the others;[24] (3) reject SWB's tariff and partially suspend all the other tariffs;[25] (4) either partially reject or impose a one-day suspension of all of the tariffs;[26] and (5) suspend for one day and investigate some or all of the tariffs.[27] All of the tariffs were protested by one or more parties. Eight LECs filed replies to the petitions.[28] For the reasons discussed below, we grant the petitions in part and deny them in part.

III. DISCUSSION

A. Rate Levels

1. Overhead Loadings

11. Background. In its Virtual Collocation Order, the Commission reaffirmed its earlier decision that the LECs must justify any proposal to assign greater overhead loadings to

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[23] See Jones Lightwave Petition at 1 (urging partial rejection of US West's tariff); McLeod Petition at 1 (seeking partial rejection of US West's tariff); Cablevision Petition at 1 (requesting partial rejection of Ameritech's and Bell Atlantic's tariffs). Jones Lightwave also urges the Commission to act pursuant to its authority under Section 205 of the Communications Act, 47 U.S.C. § 205, to prescribe just and reasonable rates based on high capacity service cost data previously filed by US West. See Jones Lightwave Petition at 8 n.10, 9.

[24] Teleport Petition at 1-4 (objecting strongly to SWB's and US West's tariffs).

[25] Time Warner Petition at 40-41.

[26] MFS Petition at 1-2, 7.

[27] ALTS Petition at 1 (requesting suspension and investigation of some of the LECs' tariffs); MCI Petition at 1 (requesting suspension and investigation of all of the LECs' tariffs).

[28] The replies to the petitions to reject or suspend and investigate the virtual collocation tariffs were due on October 31, 1994. SWB and United filed their replies on November 1, 1994, concurrently with motions to accept late-filed replies. SWB asserts that its courier failed to retrieve SWB's reply from SWB's office in time for the pleading to be filed with the Commission on October 31. SWB Motion at 1. United contends that due to a corporate software upgrade, its pleading could not be printed correctly in time for filing on October 31. United Motion at 1. Because we find that SWB and United have shown good cause for their short delay in filing replies, we grant their motions and accept their replies.

expanded interconnection service than are assigned to "comparable services."[29] The Commission explained that LECs have the burden of demonstrating that their connection charges meet this overhead loading standard, and are otherwise just, reasonable, and not unreasonably discriminatory.[30] To this end, the Commission noted that the price cap LECs may be required to submit additional information to enable the Commission to verify that the overhead loadings assigned to expanded interconnection services do not unreasonably differ from those assigned to comparable services.[31]

12. The Bureau, in the earlier Special Access Physical Collocation Tariff Suspension Order, sought to compare the LECs' proposed overhead loadings for expanded interconnection through physical collocation with overhead loadings for comparable special access services, such as DS1 and DS3 services.[32] In a subsequent designation order, the Bureau requested detailed overhead data for individual comparable services. In that order, the Bureau refined its definition of "comparable" services to include all generic DS1 and DS3 services, including those subject to discounted volume and term pricing plans and any specialized services.[33] Because the Bureau did not receive adequate overhead loading data regarding comparable services in response to the foregoing requests, we issued another detailed request for overheads and cost support data concurrently with the Commission's Virtual Collocation Order in our Tariff Review Plan Order.[34] In that order, we further refined our definition of comparable services, as explained below, and sought more detailed cost support data.

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[29] Virtual Collocation Order, 9 FCC Rcd at 5189 (citing Special Access Physical Collocation Order, 7 FCC Rcd at 7429; Switched Transport Physical Collocation Order, 8 FCC Rcd at 7419). For purposes of this order, an overhead loading is defined as the percent by which a rate exceeds the direct cost for a particular service. An overhead loading of 80 percent, for example, raises total costs (and hence the rate) 80 percent above the level of direct cost. To derive the "overhead loading factors" shown in Appendix C, the LECs divided total cost by direct cost for each rate element. Hence, an overhead loading of 80 percent, for example, is equivalent to an overhead loading factor of 1.80.

[30] Id.

[31] Id. at 5189.

[32] See Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993)(Special Access Physical Collocation Tariff Suspension Order).

[33] Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, 8 FCC Rcd 6909 (Com. Car. Bur. 1993)(Special Access Physical Collocation Designation Order).

[34] Tariff Review Plan Order, 9 FCC Rcd at 5682-83.

13. Petitions. Petitioners assert that several LECs, such as Ameritech, SWB, and Bell Atlantic, have higher overhead loading factors for virtual collocation rate elements than for rate elements associated with competitive services offered to LEC customers. They ask the Commission to prescribe reasonable factors consistent with those reflected in other comparable LEC services.[35] MFS maintains that the LECs' pricing practices constitute a discriminatory "price squeeze," whereby a wholesale supplier, who also sells at retail, charges high rates to its wholesale customers so that they cannot compete effectively with the supplier's retail rates. According to MFS, LECs are loading a greater proportion of common costs onto interconnectors than are borne by the customers of the LECs' high capacity services whom MFS and others are competing to serve. MFS contends that this pricing practice effectively forces LEC competitors to subsidize the LEC services against which they compete.[36] MFS, ALTS, and Time Warner also assert that the LECs' overhead loading methodologies result in double-counting of some costs, e.g., administration expense. These parties claim that such costs are not only recovered once, as a direct cost assigned to one of the rate elements, but are also recovered a second time as part of the overhead loadings assigned to other rate elements.[37]

14. Replies. Bell Atlantic and BellSouth respond that the overhead loadings of their virtual arrangements are below or comparable to loadings on their high capacity offerings.[38] In particular, Bell Atlantic contends that it used the same factor for the nonrecurring charge for competitive end user DS3 services that it used for its DS3 cross-connect nonrecurring charge.[39] Bell Atlantic asserts that, for recurring charges, the overhead loading in its collocation filing is lower than those assigned to its comparable DS1 and DS3 end user services, which belies MFS's claim that the collocation rates subsidize Bell Atlantic's DS1 and DS3 services.[40] Ameritech submits that petitioners' comparisons fail to include rate elements of comparable services with factors similar to those used for interconnection.[41]

15. SWB questions the relevance of any overhead comparisons that focus on the overhead loadings applied to only one service out of the hundreds of high capacity access services it offers. SWB asserts that the Commission did not intend that "comparable services"

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[35] See, e.g., MFS Petition at 14-15; Cablevision Petition at 3, 8-9.

[36] MFS Petition at 13-14.

[37] Id. at 26; ALTS Petition at 6-7; Time Warner Petition at 35-37.

[38] Bell Atlantic Reply at 8; BellSouth Reply at 11.

[39] Bell Atlantic Reply at 8.

[40] Id.

[41] Ameritech Reply at 7.

include all these high capacity services but, rather, only the DS1 and DS3 services.[42] SWB maintains that it was not ordered to apply overhead loadings consistent with the lowest priced DS1 or DS3 services, or a particular DS1 or DS3 rate element, such as channel terminations. According to SWB, the amount of overhead in its proposed virtual collocation rates is no higher than the overhead reflected in comparable recurring rates. SWB avers that it used the classification of DS1 and DS3 services contained in the DS1 and DS3 subindex of the price cap Trunking Basket -- a classification that was not challenged when used in SWB's 1993 physical collocation filing.[43] Moreover, SWB argues, the Virtual Collocation Order did not require LECs to disregard services with the highest amount of overhead. SWB asserts that, since the overhead reflected in collocation rate elements cannot be higher than that contained in comparable LEC services, the average overhead reflected in all DS1 and DS3 elements "effectively becomes the overhead ceiling on collocation elements."[44] Finally, several LECs deny that overhead costs are included in specific rate elements and are also recovered in overhead factors.[45]

16. Discussion. For most LECs, one of the primary factors affecting the total charge for virtual collocation is the LECs' choice of overhead loadings. US West, for example, use an overhead loading of 72 percent for most recurring charges. This loading raises total cost, and hence the rate, 72 percent above the level of the corresponding direct cost. Bell Atlantic uses an overhead loadings of 65 percent for most recurring charge elements. Significantly, these two companies and SWB not only use some of the highest overhead loadings reported by the LECs, but also impose the highest total charges for virtual collocation service. For example, the monthly total charge per DS1 for providing interconnection for 100 DS1 circuits, excluding the termination equipment charge, is $79 for Bell Atlantic and $33 for both SWB and US West. These charges far exceed those of other large LECs, who impose charges ranging from $8 (for CBT and certain United companies) to $23 (for GSTC California).[46]

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[42] SWB Reply at 18.

[43] Id. at 20.

[44] Id. at 21.

[45] See, e.g., Bell Atlantic Reply at 6-7, 9-10; BellSouth Reply at 12-13.

[46] Some costs are recovered through recurring charges by some LECs and through nonrecurring charges by others. A comparison of LEC rates therefore is greatly facilitated by aggregating each LEC's recurring and nonrecurring charges together into a single equivalent rate. To accomplish this, we converted all nonrecurring charges into equivalent recurring rates by assuming that the nonrecurring charges are recovered monthly over a five-year period and that the LECs would earn 11.25 percent interest on unpaid balances during that period. In addition, our comparison of LEC rates is also facilitated by excluding the charges for termination equipment. This exclusion is necessary due to the large differences we observed

17. The overhead loading standard set forth in the Virtual Collocation Order states that, if a LEC chooses to use nonuniform overhead loadings, it may not recover a greater share of overheads in charges for expanded interconnection services than it recovers in charges for comparable services, absent justification.[47] To obtain the overhead loadings that LECs had assigned to comparable services, we first identified these services. In the Tariff Review Plan Order, we determined that the DS1 and DS3 virtual collocation services are comparable to all point-to-point DS1 and DS3 services.[48] All these services engage the same basic types of equipment in the LECs' central offices. They all require, for example, a central office entrance cable, an equipment bay containing an optical line terminating multiplexer (OLTM), and a cross connect. Moreover, this DS1- and DS3-level central office equipment constitutes a substantial, if not predominant, share of the total cost for all these services. Further, even SWB concedes that these DS1 and DS3 services are comparable to the virtual collocation services.[49]

18. We also determined that LECs offer these point-to-point services in two basic forms: (a) as a service providing channel termination without interoffice mileage and (b) as a

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in the treatment of that equipment under various LEC tariffs. Whereas most LECs provide termination equipment under an arrangement whereby they acquire it from the interconnector for $1, several LECs charge a rate they claim is based on the much greater cost of acquiring the equipment from the manufacturer. A comparison of these higher rates for termination equipment must await our investigation. The LECs imposing such rates generally did not provide sufficient information regarding the type of termination equipment that will be used for us to fully assess the reasonableness of these rates.

[47] Virtual Collocation Order, 9 FCC Rcd at 5189.

[48] Tariff Review Plan Order, 9 FCC Rcd at 5682-83. We note that a point-to-point service provides a connection between the customer premises (which, for an interexchange carrier, likely would be its point of presence) and another location, which may be another customer premises or LEC central office.

[49] SWB Reply at 18, 20. Although SWB recognizes these services are comparable, it nonetheless fails to compare them properly. To justify its overall rate for virtual collocation, SWB compares it to the much higher rate it charges for DS1 electrical channel termination service. Absent any adjustment to allow for differences in equipment requirements, this comparison is flawed. The latter service not only requires termination equipment at the LEC central office (as does virtual collocation service) but also requires such equipment to be provided by the LEC at the customer premises, thereby approximately doubling the equipment cost. Moreover, the electrical channel termination service requires a cable several miles longer than the short intraoffice cable required for virtual collocation. See id. at 18.

service providing both channel termination and interoffice mileage.[50] These basic services are further distinguished in LEC tariffs as special or switched access; by providing electrical or optical termination; by offering volume and term discounts; and by offering a specialized feature such as a self-healing network.[51] After defining comparable services in this manner, we requested that LECs identify the overhead loadings applied to each of these services and provide the underlying cost data used in calculating the loadings.[52]

19. Next, we determined whether any LECs had chosen to use uniform overhead loadings for all of their DS1 and DS3 services. The submitted overheads data show that none has done so. On the contrary, all LECs report wide variations in the loadings applied to their comparable DS1 and DS3 services. Bell Atlantic, for example, reports loadings ranging from 23 percent to 486 percent. BellSouth reports loadings ranging from 17 percent to 727 percent, and GSTC reports loadings ranging from 2 percent (in California) to 2,581 percent (in Washington).

20. In view of the LECs' use of nonuniform overhead loadings, the third step in our analysis was to compare the loadings assigned to virtual collocation service with those assigned to the comparable DS1 and DS3 services and to determine if the observed differences have been justified.[53] The information submitted by the LECs in support of their

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[50] Because a channel termination facility connects the customer premises to the nearest central office, interoffice mileage is not needed unless the customer wants to be connected to another central office.

[51] Because LECs combine these service features in numerous ways, most of the larger LECs offer nearly fifty different point-to-point DS1 and DS3 services. Indeed, US West offers such a variety of volume and term discounts that it identifies 396 tariffed services. If a LEC uses traffic-density zone pricing within study areas, the number of services (and hence loading factors) may double or triple, depending on the extent to which services are offered in all three zones. To reduce the reporting burden on the LECs, and to avoid having multiple virtual collocation rates within a single study area, we accepted Zone 1 overheads data as sufficient.

[52] Tariff Review Plan Order, 9 FCC Rcd at 5682-83.

[53] As explained in paragraph 12, supra, the Bureau has sought to make such a comparison of overhead loadings since the LECs filed their initial special access expanded interconnection tariffs in 1993. Those tariffs, however, failed to provide adequate data to permit the Bureau to compare the LECs' proposed loadings to loadings applied to comparable services. In the absence of such data, the Bureau compared the LECs' proposed loadings with the LECs' Automated Reporting Management Information System (ARMIS) data for the special access category as a whole. See Special Access Physical Collocation Tariff Suspension Order, 8 FCC Rcd at 4602. The Bureau requested detailed overhead data in a subsequent designation order, but was unable to obtain overhead cost showings sufficient to

proposed rates shows substantial differences between the loading factors they propose to apply to their charges for expanded interconnection services and those currently applied to comparable services. Bell Atlantic, for example, proposes to assign loadings of 65 percent to collocation recurring charges while assigning loadings as low as 23 percent to the comparable services. US West proposes to assign overhead loadings of 72 percent to most collocation rate elements while assigning loadings as low as 27 percent to the comparable services.

21. Moreover, none of the LECs attempted to show that these wide variations in loadings are due to differences in the overhead costs actually incurred by individual services. On the contrary, the LECs generally concede this is not the case. Bell Atlantic explains that the variation in its loadings is due to market forces.[54] BellSouth asserts that the variation is due to three pricing considerations: market conditions; the need to maximize a service's contribution to revenue targets; and the price-cost relationship existing prior to price cap regulation.[55] US West states that it distributes overhead costs among its product offerings without regard to the actual incurrence of such costs.[56] And SWB submits that the overhead loading it assigns to a particular service depends primarily on market conditions.[57] Based on the LECs' statements and submitted cost data, we conclude that the great disparity exhibited in overhead loadings primarily reflects market conditions. It appears that LECs tend to assign low overheads in markets where they face actual or potential competition from interconnectors and assign high overheads where they do not.

22. It further appears that the Commission's policy of promoting competitive entry into the local exchange market would be frustrated by the practice of assigning high overheads to the LEC facilities upon which interconnectors rely to provide competitive services while assigning low overheads to the very services against which interconnectors are trying to compete. That is, in providing interconnection facilities, LECs are selling a

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allow it to assess the reasonableness of the LECs' proposed overhead loadings. See generally Special Access Physical Collocation Designation Order. Given that the LECs had failed to justify adequately their proposed overheads, the Commission continued to rely on ARMIS-based overhead levels, pending a final determination as to what level of overhead is just and reasonable for expanded interconnection services. See generally Special Access Physical Collocation Interim Overhead Order.

[54] Bell Atlantic Tariff Review Plan, Transmittal No. 692, at 16.

[55] BellSouth Tariff F.C.C. No. 1, Transmittal No. 223, Description & Justification at 3-33.

[56] US West Reply at 29.

[57] SWB Reply at 16.

productive input to firms against which they compete in downstream end-user markets.[58] It therefore is unreasonable, absent justification, for LECs to use high overheads to raise prices of the services needed as inputs by their competitors while simultaneously using low overheads to reduce prices of the end-user services sold in competition with those same rivals.

23. SWB is correct in observing that the Commission has not ordered LECs to apply overhead loadings that are equal to the lowest overhead loadings assigned to other DS1 or DS3 customers. SWB is incorrect, however, in concluding that this implies that the only limitation on virtual collocation overheads is an overhead ceiling equal to the average overhead loading for all DS1 and DS3 services combined. An "average overhead loading" standard would not preclude LECs from employing the discriminatory practice described above. If a LEC were to use an average overhead loading factor for services provided to interconnectors and a below-average loading factor for LEC services with which the interconnectors compete, the effect would be to hamper the ability of the interconnectors to compete effectively. Moreover, the broad standard adopted by the Commission neither supports SWB's position nor limits our authority to establish the level of overhead loading that is reasonable, based on our analysis of the submitted cost and rate data.[59]

24. Thus, based on the current record, we conclude that in their tariff support materials, most LECs have failed to justify their proposals to recover a greater share of overhead costs in charges for expanded interconnection services than they recover in charges for comparable services. We therefore conclude that most of the LECs' rates for virtual collocation are likely to be unreasonably high. To prevent apparently excessive rates from becoming effective while we investigate the LECs' overall proposed rate levels, we will partially suspend those rates that appear unreasonable during the remainder of the five-month suspension period pursuant to our authority under Section 204(a) of the Communications Act, 47 U.S.C. § 204(a). Our partial suspension will permit rates that do not appear to be unreasonable to become effective, subject to an investigation and an accounting order, but will prevent apparently unreasonable rates from taking effect.

25. Accordingly, pursuant to our authority under Section 204(a) of the Communications Act, we suspend the LECs' entire rates for one day, and for the remainder of the five-month suspension period we suspend the part of the rate that exceeds the levels justified by the present record. Companies are required to reduce and refile their expanded

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[58] We are unpersuaded by SWB's claim that, although its overhead loadings may reduce interconnectors' profit levels, its overhead loadings do not deter competitive entry. SWB provides no support for its claim, and fails to demonstrate that the rates it proposes are just and reasonable.

[59] See Virtual Collocation Order, 9 FCC Rcd at 5189 (citing Special Access Physical Collocation Order, 7 FCC Rcd at 7429).

interconnection rates to the levels resulting from multiplication of their filed rates by the relevant Rate Adjustment Factors (RAFs) set forth in Appendix C to this order.[60] These RAFs, when multiplied by the originally filed rate levels, will result in the following adjusted rates: (a) the rate for each rate element dedicated to DS1-level expanded interconnection services will reflect the lowest overhead loadings assigned to the LECs' comparable DS1 services; (b) the rate for each rate element dedicated to DS3-level expanded interconnection services will reflect the lowest overhead loadings assigned to the LECs' comparable DS3 services; and (c) the rate for each rate element that potentially may be used with both DS1- and DS3-level expanded interconnection services will reflect the lowest overhead loadings assigned to any comparable service, regardless of whether that service is provided at the DS1- or DS3-level.[61]

26. A rate element is dedicated to DS1 or DS3 expanded interconnection services if interconnectors would only purchase that element to provide services to customers at the DS1 or DS3 level, respectively. Because the transmission level of the cross-connects determines whether the expanded interconnection service can accommodate services to customers at the DS1- or DS3-level, we consider a rate element dedicated to DS1-level interconnection if it would only be acquired together with DS1-level cross connects. Similarly, we consider a rate element dedicated to DS3-level interconnection if it would only be acquired together with DS3-level cross connects. Finally, we consider a rate element nondedicated if it potentially may be used with either DS1- or DS3-level cross connects. A rate element for termination facilities, for example, is nondedicated if interconnectors might want to acquire it together with DS1- or DS3-level cross connects. Although we do not partially suspend some LECs' rates in this order because their overhead loading factors for virtual collocation appear to comport with the Commission's overhead loading standard, we intend to examine all LECs' overhead loadings during our investigation.

27. We believe that these overhead adjustments will facilitate the Commission's goal of encouraging economically efficient competition. During the pendency of this

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[60] In addition to showing the RAFs, Appendix C shows the direct costs and overhead factors reported by all LECs subject to RAFs except SWB. The Bureau deemed SWB's cost support submission exempt from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), subject to limited disclosure to the parties to the parties under a protective order. Because SWB has filed an application for review of the Bureau's ruling, limited disclosure of SWB's cost support data must be deferred pending Commission review of the Bureau ruling. See Letter from Kathleen M.H. Wallman, Chief, Common Carrier Bureau, to MFS, MCI, and ALTS, Freedom of Information Act Request Control Nos. 94-310, 325, 328, DA 94-1214, released Nov. 1, 1994, app. for rev. pending.

[61] If a LEC uses traffic-density zone pricing for its DS1 or DS3 services, we used the lowest rates tariffed for Zone 1 for establishing the overhead loading for the entire study area so as to avoid producing multiple rates for virtual collocation service in the same study area.

investigation, the adjustments will extend to interconnectors the same treatment of overhead assignment that the LECs give their most favored DS1 or DS3 customers. In this way, the adjustments will prevent unreasonable discrimination against the interconnectors that seek to compete with the LECs in the interstate access service market.

28. We note that the partial rate suspension ordered here may not completely resolve the issue of excessive overheads. As part of the investigation initiated in this order, LECs may be required to make additional showings, to be specified in a subsequent designation order.

2. Bell Atlantic's Maintenance-Related Charges

29. Background. In general, maintenance is a recurring expense associated with keeping facilities in good operating condition. Such expenses usually include engineering work, general supervision of maintenance workers, equipment testing, and other labor and materials incurred in the upkeep of plant. In addition to maintenance expense, Bell Atlantic apparently incurs maintenance-related administration expenses. Bell Atlantic estimates that, when maintaining customer-designated electronic equipment, these related administration expenses exceed the direct maintenance expenses by eight percent.[62] While most LECs recover these maintenance-related expenses on a time and materials basis in their tariffs, Bell Atlantic recovers them through two monthly recurring flat charges. One charge is the Cable Support Fee, which recovers the expenses incurred to maintain the entrance cable. The other charge is the DS1 Connection Service rate, which essentially recovers the expenses incurred to maintain customer-designated termination equipment.

30. Petitions. Teleport contends that Bell Atlantic's monthly recurring charges for maintenance are excessive. Teleport states that it is unclear whether these charges cover labor, equipment, or both. Teleport further avers that Bell Atlantic's maintenance appears to be covered by its overstated "service connection" fee.[63] MFS also claims that Bell Atlantic's Cable Support Fee and DS1 Connection Service charge are excessive. MFS asserts that, although the DS1 Connection Service charge recovers the cost of maintaining only interconnector-designated termination equipment, that charge far exceeds the expense Bell Atlantic reports for maintaining an entire channel termination, which includes all electronic equipment as well as internal cabling.[64]

31. Replies. Bell Atlantic argues that, because it recovers maintenance expense through a flat monthly rate rather than on the time-and-materials basis used by most other LECs, the Commission must exclude the equipment maintenance component from the LECs'

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[62] Bell Atlantic Tariff Review Plan, Maintenance and Repair Function Table.

[63] Teleport Petition, App. A, Item 4 at 1-2.

[64] MFS Petition at 24-25.

virtual collocation rates in order to properly compare these rates.[65] Bell Atlantic contends that such a comparison will show that its charge for an equivalent DS1 circuit is among the lowest of any "comparable rates" filed by any LEC.[66] Bell Atlantic also maintains it is improper for MFS to compare Bell Atlantic's rate for Connection Service to its maintenance expense for a channel termination. Bell Atlantic states that the rate in question not only includes maintenance expense but also costs association with land and buildings, cable, a fiber distribution frame, and overhead loadings.[67] Bell Atlantic avers that the comparable costs used in calculating its collocation rate are more than 40 percent lower than the costs used for the end user tariff.[68]

32. Bell Atlantic submits that based upon petitioners' comments, it is willing to remove its flat maintenance charge and instead offer maintenance of dedicated equipment on a time and materials basis during an "interim period."[69] Bell Atlantic maintains that since it has little experience from which to derive a flat rate, both Bell Atlantic and its customers would benefit from the resulting information regarding the maintenance needs of the various types of designated equipment.[70]

33. Discussion. Even after our partial disallowance of Bell Atlantic's proposed overhead loadings, Bell Atlantic's total charge for DS1 virtual collocation still appears excessive due to its maintenance-related expenses. As we noted earlier, Bell Atlantic's total charge for virtual collocation essentially excludes the cost of termination equipment because Bell Atlantic acquires such equipment for $1 under a "purchase/leaseback" arrangement with interconnectors. Even so, Bell Atlantic's total virtual collocation service charge is almost as high as that imposed by several other LECs that acquire termination equipment from the manufacturer at full market price. Given that termination equipment accounts for most of the

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[65] Bell Atlantic Reply at 3.

[66] Id. at 6.

[67] Id. at 4-5.

[68] Id. at 5-6.

[69] Id. at 4.

[70] Id. Bell Atlantic claims, however, that a time and materials charge carries more administrative burdens and less certainty than a flat charge. Bell Atlantic declares that, after it has gained experience, and based upon evolving technology, it will consider other alternatives to the flat charge for tariffing equipment maintenance. Id.

costs associated with virtual collocation service, Bell Atlantic must justify its apparently high total charge for this service.[71]

34. We agree with Bell Atlantic that it is improper for MFS to compare Bell Atlantic's rate for collocation service to its maintenance expense for a particular channel termination service. The collocation service rate includes other costs in addition to maintenance expense. For the comparison to be meaningful, the maintenance-related expenses of both services should be compared. Such a comparison, although different from that performed by MFS, nonetheless supports MFS's conclusion that Bell Atlantic's maintenance charges are excessive. Specifically, Bell Atlantic claims its monthly total maintenance-related expense, including the maintenance-related administration expenses, for its DS1 virtual collocation service is $64.71. That amount far exceeds the $21.20 total maintenance-related expense that Bell Atlantic attributes to its comparable DS1 electrical channel termination service,[72] which uses the same basic types of equipment but requires twice the amount of equipment. Although both services require the provision of a DS1-level optical line terminating multiplexer in the LEC central office, the electrical channel termination service also requires the LEC to provide this equipment at the customer premises. Further, although both services require the provision of a short length of cable inside the LEC central office, the electrical channel termination service also requires the LEC to provide several miles of cable outside the central office to connect it to the customer premises. Bell Atlantic therefore has to maintain twice as much electronic equipment, and several additional miles of cable, in providing DS1 electrical channel termination service than it does in providing virtual collocation service.[73]

35. Bell Atlantic's reported $64.71 expense for virtual collocation apparently includes $38.04 in maintenance-related expenses for maintaining the short length of cable inside the central office. As noted above, when Bell Atlantic provides channel termination service, it incurs only $21.20 in expenses to maintain both a cable several miles long as well as twice the electronic equipment used for collocation. We therefore conclude that it appears

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[71] Data submitted by CBT and US West indicate that termination equipment constitutes 92 percent and 55 percent of monthly total costs, respectively. These estimates are based on monthly total costs that include both recurring and nonrecurring costs. The nonrecurring costs were included by assuming they are recovered monthly over five years at 11.25 percent interest.

[72] Bell Atlantic Tariff Review Plan, Updated Exhibit 7, at 1.

[73] When a LEC provides a DS1 electrical termination, it installs termination equipment at both the customer premise and the central office. By contrast, when it provides virtual collocation service, it installs interconnector-designated equipment only at the central office. Teleport refers to this basic difference in equipment requirements to support its view that the average investment required for DS1 virtual collocation is less than half that required for a typical DS1 installation. See Teleport Petition, App. A, Item 2 at 3.

unlikely Bell Atlantic incurs twice the expense to maintain a much shorter cable and none of the electronic equipment.

36. Because DS1 electrical channel termination service requires twice as much investment in the same types of equipment and facilities used by DS1 virtual collocation service, and because Bell Atlantic estimates the level of maintenance-related expenses for a particular service by assuming that such expenses are directly related to investment required by the service,[74] we can obtain an apparently reasonable estimate of maintenance expense for virtual collocation by reducing Bell Atlantic's $21.20 maintenance expense (reported for DS1 electrical channel terminations) by half to reflect this fundamental difference in investment requirements. On this basis, we estimate total maintenance expense for DS1 virtual collocation to be no more than $10.60. Given Bell Atlantic's failure to justify its proposed maintenance charges, we will reduce Bell Atlantic's recovery of total maintenance expense to this level by disallowing 83.6 percent of the $26.67 in maintenance expenses (and maintenance-related administrative expenses) recovered through the DS1 Connection Service rate and 83.6 percent of the $38.04 in maintenance expenses recovered through the Cable Support Fee.

37. Accordingly, pursuant to our authority under Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), we suspend Bell Atlantic's Cable Support Fee and DS1 Connection Service rate for one day, and for the remainder of the five-month suspension period we suspend the part of these charges that exceeds the levels justified by the present record. Bell Atlantic must reduce and refile its expanded interconnection rates set at the levels resulting from the maintenance expense adjustments described above and from the multiplication of its filed rates by the relevant RAFs set forth in Appendix C to this Order. Bell Atlantic's RAFs, when multiplied by the originally filed rates for each of its rate elements, will result in rates that reflect the lowest overhead loadings assigned to Bell Atlantic's comparable services, as well as the maintenance expense assigned to these comparable services. By this action, we do not mean to discourage Bell Atlantic from filing revisions to its tariff during the pendency of this proceeding in order to address the concerns identified in this suspension.

38. We find that the approach set forth above is reasonable and will serve the public interest by promoting economically efficient competition in the interstate special access

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[74] Bell Atlantic explains that it developed maintenance factors for primary plant investments, e.g., circuit equipment investment, by dividing the maintenance expense associated with each primary plant account by the corresponding total investment. Bell Atlantic states that it then applied these maintenance factors to the various types of primary plant used by a particular service to attribute maintenance expense to that service. Bell Atlantic notes that it used a similar procedure, also based on unit investments, to attribute administration expenses to individual services. See Bell Atlantic Tariff Review Plan, Section 3, at 10-14.

and switched transport marketplace. Our upcoming designation order will address the other rate level issues that have been raised by the parties. Because of the LECs' use of disparate costing and pricing methodologies, we intend to seek additional data in our investigation concerning these issues.

B. Rate Structure

1. Recovery of Training Costs

39. Background. In the Virtual Collocation Order, the Commission reaffirmed its earlier decision, set forth in the Special Access Physical Collocation Order, that the rates, terms, and conditions for virtual collocation must be tariffed and made generally available,[75] and that LECs may not include in their tariffs individual case basis (ICB) rates, i.e., rates developed in response to individual customers' requests, for elements of virtual collocation recovering the cost of installation, maintenance, and repair of interconnector-designated equipment.[76]

40. The Commission recognized that if an interconnector selects equipment that a LEC does not currently use in a given central office, the LEC may need to provide training to its employees to install, maintain, and repair that equipment.[77] Our review of the virtual collocation tariffs reveals that BellSouth, GTE, and SWB recover the costs of training LEC technicians to perform equipment installation, maintenance, and repair on an individual case basis.

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[75] Virtual Collocation Order, 9 FCC Rcd at 5171 (citing Special Access Physical Collocation Order, 7 FCC Rcd at 7442-43). In the Virtual Collocation Order, the Commission made some changes in its pricing rules to ensure the reasonableness of generally available rates for virtual collocation services involving interconnector-designated equipment. Virtual Collocation Order, 9 FCC Rcd at 5187-88. These changes, discussed in paragraph 55, infra, replaced the Commission's rule in the Special Access Physical Collocation Order that the rates, terms, and conditions for interconnector-designated equipment may be individually negotiated, as long as they are subsequently tariffed and made generally available. See Special Access Physical Collocation Order, 7 FCC Rcd at 7442-43.

[76] See Virtual Collocation Order at 5174. The Commission reaffirmed that rates for installation, maintenance, and repair must be uniform for all virtual collocation customers in each central office, but may vary between central offices corresponding to cost differences. Id. (citing Special Access Physical Collocation Order, 7 FCC Rcd at 7442-43.)

[77] Id. at 5172-73. The Commission concluded, however, that customers should not be required to pay for costly training of LEC employees if the LEC uses qualified outside contractors to install, maintain, or repair LEC equipment. Id. at 5172.

41. Petitions. Several petitioners object to the rate structures LECs use to recover the cost of training LEC technicians to install, maintain, and repair interconnector equipment that differs from the type of equipment the LEC uses. MFS, for example, claims that these structures are so vague that interconnectors are unable to determine the magnitude of charges to which they may be subject.[78] MFS maintains that US West's tariff is unclear regarding the application of its tariffed half-hour labor rate, and that most of the other LECs, such as BellSouth, SWB, United, and Ameritech, have stated that training charges will be assessed on an individual case basis. MFS contends that these ICB provisions provide no basis for interconnectors to estimate the price of training, and thus violate the Commission's rules prohibiting overly vague tariff provisions.[79]

42. Time Warner argues that the Commission should reject an ICB approach and require LECs to tariff specific time and expense charges for each and every function, e.g., hourly rate, per diem, and travel expenses.[80] MCI agrees, asserting that the Commission clearly ruled that it will not permit LECs to individually negotiate the rates for expanded interconnection services. MCI contends that LECs should be required to file tariffs for all training fees to ensure that the rates are just and reasonable.[81]

43. Teleport, Cablevision, McLeod and Jones Lightwave urge the Commission to require LECs to provide more detailed terms and conditions regarding recovery of LEC technician training costs.[82] Jones Lightwave maintains that the tariffs should identify the equipment the LEC uses in its facilities so that interconnectors may avoid charges for training.[83]

44. Replies. BellSouth and SWB disagree with petitioners' suggestion that they develop averaged charges for training, and contend that several variables affect the cost of training which the LEC cannot know in advance, such as whether the training will take place in the same general area in which the arrangement is being installed.[84] SWB asserts that it

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[78] MFS Petition at 30.

[79] Id.

[80] Time Warner Petition at 17 (objecting to tariffs of Ameritech, BellSouth, and SWB because they do not limit training charges).

[81] MCI Petition at 14-15.

[82] Teleport Petition, App. A, Item 5 at 1; Cablevision Petition at 11; McLeod Petition at 7; Jones Lightwave Petition at 10-11.

[83] Jones Lightwave Petition at 14 n.12.

[84] BellSouth Reply at 7; SWB Reply at 42.

intends to charge interconnectors only for those training expenses incurred as a direct result of equipment requests.[85] According to SWB, the only "average" tariff charge that is appropriate is its additional labor charge to recover the cost of the employees' time spent in fulfilling the interconnectors' training requirements.[86]

45. GTE asserts that training costs cannot be identified until the interconnector informs GTE of the type of equipment and the LEC offices that the interconnector has selected for collocation.[87] GTE avers that it permits interconnectors to avoid training costs entirely by using standard GTE termination equipment, and submits that it will provide a list of standard equipment and cost estimates upon interconnector request.[88]

46. United explains that, contrary to petitioners' contentions, its "time and materials" approach to nonstandard equipment training charges is different from an ICB rate because the hourly cost of the technician is known; the only variable is the number of training hours required for the specific piece of equipment.[89] US West explains its training provisions, and states that it will amend its tariff to clarify its intentions regarding application of its labor rates.[90] Ameritech explains that under its training provisions, the interconnector may provide its own trainer, or contract directly with an outside training vendor.[91]

47. Discussion. We find that training is a function of equipment maintenance and repair, and thus conclude that the Virtual Collocation Order precludes ICB pricing for rate elements that recover the cost of training LEC technicians to service interconnector-designated transmission equipment. We therefore order BellSouth, GTE, and SWB to delete any

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[85] SWB Reply at 41-42.

[86] Id. at 42.

[87] GTE Reply at 16.

[88] Id. at 16-17.

[89] United Reply at 5.

[90] US West Reply at 47. US West also states that it would be willing to amend its tariff to specify the number of personnel to be trained and to make rate structure changes. Id.

[91] Ameritech Reply at 9. Further, Ameritech explains that it will not provide training for its personnel on equipment supplied by interconnectors that is not otherwise used by Ameritech, but it will pay the wages of its personnel during training. Ameritech states that when the interconnector chooses not to train any Ameritech personnel in advance, the interconnector must provide "real time" training if it is necessary, and pay Ameritech's hourly maintenance charges. Id.

references to ICB pricing,[92] and replace these provisions either with specific rates or time and materials charges.[93] With respect to time and materials charges, LECs should provide actual labor rates and material costs in their tariffs, as opposed to simply stating that they will recover the costs of training on a time and materials basis.

48. We also conclude that the training provisions of US West and Ameritech are unreasonably vague, in violation of the Virtual Collocation Order's requirement that the LECs' rate structures be "clear and easy to understand," and that the facilities and services provided under each rate element be clear on the face of the tariff.[94] Moreover, we believe that these vague provisions violate the Commission's rules requiring "clear and unambiguous" tariff provisions.[95] US West, in fact, acknowledges in its reply that it plans to amend its tariff to clarify application of its labor rates. Ameritech's detailed explanation of its training provision in its reply comments demonstrates the need for clarification of its tariff. Thus, we reject the foregoing provisions as patently unlawful, and order US West and Ameritech to remove these provisions and to refile tariff provisions that clarify their recovery of training costs in accordance with their reply comments. We will examine additional issues concerning charges that recover training costs in the investigation initiated in this order.

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[92] We find that, contrary to MFS's claim, United recovers the cost of training LEC technicians to service interconnector-designated equipment on a time and materials basis, rather than on an individual case basis.

[93] We note that we took similar action in our Special Access Physical Collocation Tariff Suspension Order, in which we reviewed, inter alia, the virtual collocation tariffs filed by those LECs that were not required to offer physical collocation service in certain central offices. We directed certain LECs to delete references to ICB pricing (except for the equipment dedicated to the virtual collocator) and to replace ICB rates either with specific rates or time and materials charges. See Special Access Physical Collocation Tariff Suspension Order, 8 FCC Rcd at 4602. In a subsequent order, we directed Bell Atlantic to delete an ICB rate for installation of virtual collocation equipment and to replace it with a specific rate or time and materials charges. See In the Matter of Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Switched Transport, 9 FCC Rcd 817 (Com. Car. Bur. 1994); see also Supplemental Designation Order and Order to Show Cause, CC Docket No. 93-162, 9 FCC Rcd 2742 (Com. Car. Bur. 1994) (designating additional issues regarding the LECs' use of time and materials charges in their physical collocation tariffs). As stated in footnote 75, supra, the Virtual Collocation Order set forth pricing rules to replace the Commission's earlier rule permitting ICB pricing for the equipment dedicated to the virtual collocator.

[94] See Virtual Collocation Order, 9 FCC Rcd at 5186.

[95] See 47 C.F.R. § 61.54.

2. *Recovery of "Extraordinary Costs"*

49. Background. In our Special Access Physical Collocation Designation Order, we asked LECs whose tariffs contain provisions allowing them to impose charges to recover additional, extraordinary, or individually determined costs (i.e., costs that are not specifically and individually listed in their tariffs) to explain why inclusion of such provisions is reasonable. The Bureau also directed LECs to define the term they use to permit recovery of such costs (e.g., additional, extraordinary).[96] In their virtual collocation tariffs, BellSouth, SWB, and United include provisions that permit them to impose charges to recover costs that are not specifically and individually listed in their tariffs.

50. Petitions. Claiming that it is anticompetitive, MFS and ALTS urge rejection of SWB's proposal to use ICB pricing for charges designed to recover "extraordinary costs that would not be incurred but for an interconnector's requirements."[97] ALTS demands that SWB define its rate structure now, not at some future time.[98] MFS also objects to United's provision stating that if "additional environmental controls" are required to accommodate the interconnector, the interconnector will be charged for them. MFS further objects to BellSouth's proposal to charge interconnectors "rates, terms and conditions that are unique to a virtual collocation arrangement."[99]

51. Replies. SWB defends its charges for recovery of "extraordinary costs" on the grounds that it is appropriate to track and bill these types of costs to the interconnector rather than to the general rate base. SWB avers that it is appropriate for an interconnector to pay for any labor or materials used to meet a request for that interconnector if that request involves activities not anticipated or required to provide virtual collocation for all interconnectors.[100] For example, SWB argues, if a request involves modifying floor space to accommodate equipment, it would not be appropriate to develop another nonrecurring charge to establish an average rate for "rare possible modifications" of floor space.[101] SWB insists that ratepayers should not bear an extraordinary cost caused by a single interconnector's request. According to SWB, recovery of these types of costs on an individual case basis is

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[96] Special Access Physical Collocation Designation Order, 8 FCC Rcd at 6917.

[97] MFS Petition at 18; ALTS Petition at 19-20.

[98] ALTS Petition at 20.

[99] MFS Petition at 31.

[100] SWB Reply at 40.

[101] Id. at 40-41.

consistent with the Virtual Collocation Order, which requires LECs' rate structures to reflect cost-causation principles.[102]

52. Discussion. We are concerned about the possible anticompetitive effect of provisions allowing LECs to recover "extraordinary costs" in a mandatory virtual collocation regime in which the LEC has total control over installation, maintenance, and repair of interconnector-designated equipment. We believe that these "extraordinary cost" provisions may unreasonably prevent interconnectors from predicting their total costs for virtual collocation.

53. Although SWB defends its "extraordinary cost" provision as necessary to meet interconnectors' individual requests, SWB's tariff fails to define the equipment and criteria it uses to classify an installation or modification as one that would permit it to recover for "extraordinary costs." For example, SWB fails to define which types of interconnector-designated transmission equipment would require "major" modifications to floor space, and what constitutes a "major" modification. Nor do United and BellSouth define which situations would result in the LEC's assessment of additional charges. For example, United neither defines what sort of "additional environmental controls" may be required, nor what type(s) of transmission equipment may require substantial environmental changes. Further, BellSouth fails to provide interconnectors with an explanation of the equipment and criteria it would categorize as "unique" to a virtual collocation arrangement.

54. We therefore conclude that the LECs' "extraordinary cost" provisions violate the Virtual Collocation Order's requirement that the LECs' rate structures be "clear and easy to understand," and that the facilities and services provided under each rate element be clear on the face of the tariff.[103] Further, we conclude that these LECs' provisions violate the Commission's rules requiring "clear and unambiguous" tariff provisions.[104] To the extent that any LECs incur "extraordinary" costs in conjunction with virtual collocation, they should file one-time nonrecurring charges with full cost support when they incur such costs. We will examine additional issues regarding "extraordinary cost" provisions in the investigation initiated in this order.

C. Terms and Conditions - Interconnector-Designated Equipment

55. Introduction. Our review of the record reveals that SWB and US West did not comply with certain Commission rules regarding interconnector-designated equipment. In the Virtual Collocation Order, the Commission stated that it was concerned about the reasonableness of the purchase prices of central office virtual collocation equipment, as the

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[102] Id. at 49-50 (citing Virtual Collocation Order, 9 FCC Rcd at 5186).

[103] See id. at 5186.

[104] See 47 C.F.R. § 61.54.

rates for services involving use of this equipment are based on those purchase prices. The Commission explained that it had two primary concerns: that LECs do not have an incentive to obtain the lowest possible price, since their costs will be passed on to their competitors, the interconnectors; and that LECs purchasing equipment they do not ordinarily use in their networks may not be able to obtain the volume discounts available to interconnectors that regularly use such equipment in their networks. To address these concerns, the Commission required LECs to base the direct costs of providing such equipment on the "lowest purchase price reasonably available to them to serve an interconnector."[105] The Commission stated that in applying this standard, it would find probative the price at which an interconnector may offer to sell the desired equipment to the LEC.[106] The Commission stated, however, that LECs are not required to purchase the equipment from interconnectors.[107]

1. SWB's Equipment Sale Requirement

56. Background. SWB's tariff provides that if an interconnector is the least-cost provider of the designated equipment, it must allow SWB to purchase as many units of this equipment as SWB desires, even if SWB will use these additional units to provide service to others. Further, SWB's tariff provides that if the interconnector is unable to allow SWB to purchase as many units as it wishes at the offered price, SWB is under no obligation to purchase any units of designated equipment from the interconnector.[108] SWB claims in its Description & Justification that its equipment sale requirement will ensure that it can provide equipment at the same prices to its other customers.[109]

57. Petitions. MFS and MCI argue that SWB's tariff requirement places an unfair burden on the interconnector, and will likely afford SWB the opportunity to purchase from a company other than the least-cost supplier. [110] They insist that SWB too narrowly restricts the Virtual Collocation Order requirement that LECs purchase equipment from the least-cost provider.[111] Time Warner argues that SWB's provision violates the directives of the Virtual

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[105] Virtual Collocation Order, 9 FCC Rcd at 5188.

[106] Id. The Commission stated that any costs incurred above the reasonably available price are not prudently incurred, and thus should not be reflected in the LECs' rates. Id.

[107] Id.

[108] See SWB Tariff F.C.C. No. 73, Transmittal No. 2383, Section 25.2.1 (C)(5).

[109] See SWB Tariff F.C. C. No. 73, Transmittal No. 2383, Description & Justification at 4-5.

[110] MCI Petition at 17-18.

[111] MFS Petition at 36.

Collocation Order that customer selection of equipment is essential.[112] According to Time Warner, the requirement permits SWB to control the price interconnectors must pay for designated equipment.[113] Time Warner also objects to SWB's statement in its Description & Justification that its equipment sale provision is necessary to comply with the Commission's requirement that offerings be generally available to similarly situated customers.[114] ALTS maintains that SWB has effectively sabotaged the "offer" benchmark that the Commission established to protect interconnectors from price gouging by LECs.[115]

58. Reply. SWB defends its provision, claiming that it is highly unlikely that MFS can buy equipment at prices that are substantially less than the prices SWB pays for the equipment.[116] SWB argues that if MFS has found a legitimate lower cost source for identical equipment, "SWB would be interested in making arrangements for purchasing equipment from this source -- assuming all relevant terms are equivalent and the price is not dependent on how SWB will use the equipment."[117]

59. Discussion. We conclude that SWB's provision regarding equipment purchases violates the pricing rules set forth in the Virtual Collocation Order. As stated above, these rules were intended to protect interconnectors from excessive LEC rates for equipment that interconnectors could obtain at volume discounts. The Commission did not contemplate that a LEC would make its virtual collocation offering contingent upon whether the interconnector will sell the LEC unlimited units of equipment for the LEC to provide service to other customers. Moreover, as petitioners observe, SWB's provision may have the collateral effect of interfering with the interconnector's right to specify reasonably the equipment dedicated to its use. Under SWB's provision, if an interconnector is unable to arrange for SWB to purchase, at the interconnector's offered price, as many units of equipment as SWB desires, the interconnector may have no choice but to obtain the equipment from SWB at a higher price.

60. We also disagree with SWB that its tariff provision is a reasonable response to the Commission's requirement that virtual collocation offerings be generally available to

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[112] Time Warner Petition at 14.

[113] Id. at 15.

[114] Id. at 15, n.32.

[115] ALTS Petition at 10.

[116] SWB Reply at 23. SWB urges the Commission to require MFS to provide material prices supporting its contention. SWB asks that MFS's claim be dismissed if MFS refuses to provide support. Id. at 24.

[117] Id. at 23.

similarly situated customers. Although SWB claims in its Description & Justification that its equipment sale requirement will ensure that it can provide equipment at the same prices to other customers, the Virtual Collocation Order specifically states that if the costs prudently incurred by LECs to serve different interconnectors are different because the interconnectors are not similarly situated, the difference in the rates charged to different customers does not constitute unreasonable discrimination under Section 202 of the Communications Act, 47 U.S.C. § 202.[118] The Commission explained that an interconnector that relies on the LEC to purchase equipment from a third party at a price the LEC negotiates is not similarly situated to, and may not pay the same charges as, an interconnector that offers to sell the equipment to the LEC itself at a lower price.[119] In light of the foregoing discussion, we conclude that SWB's equipment sale provision violates the Virtual Collocation Order. We further conclude that SWB's requirement that interconnectors sell it additional units of equipment constitutes an unreasonable practice under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). As SWB's equipment sale provision violates both the Virtual Collocation Order and the Act, we reject that provision as patently unlawful.[120]

2. US West's Equipment Tariffing Procedure

61. Background. US West's tariff is silent on US West's obligation to base the direct costs of providing virtual collocation equipment on interconnectors' reasonable offers. However, US West states in its Description & Justification that:

> At this time, US West intends to purchase equipment only from bona fide equipment vendors. US West does not intend to purchase equipment from interconnectors, regardless of the price proffered from them to us.[121]

62. Petitions. ALTS objects to US West's statement that it does not intend to purchase equipment from interconnectors, regardless of the prices. According to ALTS, US West has effectively precluded interconnectors from presenting offers pursuant to the

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[118] Id. at 5189.

[119] Id. at 5188-89.

[120] We note that on December 6, 1994, SWB filed revisions to its virtual collocation tariffs to modify several provisions that had been protested by petitioners. See SWB Tariff F.C.C. No. 73, Transmittal No. 2407, filed Dec. 6, 1994. We will examine these provisions in the investigation initiated in this order.

[121] US West, Tariff F.C.C. No. 73, Transmittal No. 531, Description & Justification at 2-4.

procedure established in the Virtual Collocation Order.[122] McLeod, too, complains that US West refuses to purchase collocation equipment from collocators.[123]

63. Reply. US West replies that its decision not to purchase designated equipment from an interconnector, or to purchase such equipment at an interconnector's "putative cost basis," is not inconsistent with the Virtual Collocation Order.[124] US West maintains that interconnectors are not equipment vendors, and that US West has no legal or regulatory mandate to purchase from them.[125] US West asserts that "the fact that US West's [equipment] rates may be high, or may be higher than an interconnector itself could secure in the market, is fundamentally and legally irrelevant."[126] US West also argues that the Commission's requirement that interconnectors set the price they pay for equipment ultimately discriminates against small interconnectors in favor of those with manufacturing affiliates.[127]

64. Discussion. While the Virtual Collocation Order does not compel US West to purchase designated equipment from interconnectors, the Order requires US West to base its equipment rates on the lowest purchase price reasonably available to it to serve an interconnector -- which may be the price at which an interconnector may offer to sell the equipment to US West. Although US West may purchase equipment from any vendor, it must compute the charge for that equipment based on the lowest reasonable offer it has received, consistent with the Virtual Collocation Order's requirement that LECs accept reasonable offers from interconnectors. Accordingly, we order US West to implement the procedure established in the Virtual Collocation Order. We would consider any other procedure used by US West to violate the Virtual Collocation Order and to be an unreasonable practice prohibited by Section 201(b) of the Act.

D. Transition from Physical to Virtual Collocation Regime

65. Background. In the Virtual Collocation Order, the Commission concluded that the transition from a mandatory physical to a mandatory virtual collocation regime generally presents questions that should be addressed on a case-by-case basis.[128] The Commission

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[122] ALTS Petition at 9.

[123] McLeod Petition at 4.

[124] US West Reply at 10.

[125] Id. at 11.

[126] Id. at 14.

[127] Id. at 15.

[128] Virtual Collocation Order, 9 FCC Rcd at 5211.

delegated authority to the Chief, Common Carrier Bureau, to address these matters.[129] Further, the Commission delegated to the Bureau authority to develop special dispute resolution mechanisms to mediate disputes and ensure that they are settled expeditiously, fairly, and consistently.[130]

66. As described in paragraph 6, supra, LECs electing to discontinue their physical collocation offerings agreed to file interim tariffs that would ensure uninterrupted expanded interconnection service during the transition from physical to virtual collocation arrangements. Further, LECs agreed that they would assure their expanded interconnection customers an orderly transition from physical to virtual collocation arrangements after December 15, 1994.[131]

67. In their tariffs filed on September 1, the LECs provided for transition periods ranging in length from two weeks to several months from December 15, 1994.[132] In its tariff, GTOC states that if an interconnector does not remove its equipment within 15 days of the termination date, the interconnector will forfeit title to GTOC.[133] In addition, SWB, BellSouth, and GTOC address in their tariffs the issue of LEC payment of refunds for nonrecurring charges associated with physical collocation arrangements that are converted to virtual arrangements. SWB's tariff states that "if an interconnector has made advance payment of nonrecurring charges and subsequently cancels the order prior to completion and SWB has not completed the work requested, SWB will refund any portion of the advance payment which has not been expended in working the order."[134] BellSouth's tariff states that BellSouth will, "at the time the customer chooses either to discontinue the EIS arrangement, or to convert it to a VEIS arrangement, refund the Space Preparation Charge and the Space

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[129] Id.

[130] Id. at 5178.

[131] See Letter Agreement.

[132] See, e.g., GTE, Ameritech (December 31, 1994); SWB (June 13, 1995).

[133] GTOC Tariff F.C.C. No. 1, Transmittal No. 905, § 17.4.1(A). GTOC, which currently has this forfeiture provision in its physical collocation tariff, proposes to retain the provision in the transition plan set forth in its permanent virtual collocation tariff. The provision is scheduled to expire at the end of the day on December 31, 1994. We note that SWB's initial virtual collocation tariffs filed on September 1 included a forfeiture provision, which MFS and Teleport challenged in their petitions. See MFS Petition at 9; Teleport Petition, App. A, Item 6 at 2. On December 6, 1994, SWB removed this provision from its virtual collocation tariffs. See SWB Tariff F.C.C. No. 73, Transmittal No. 2407, filed Dec. 6, 1994.

[134] SWB Tariff F.C.C. No. 73, Transmittal No. 2383, § 25.7.

Construction Charge as set forth in 20.16(b) and 20.16(c) following."[135] GTOC's tariff states that "[GTOC] is not required to refund any portion of the nonrecurring charges or fees associated with physical EIS arrangements which are converted to virtual."[136]

68. Petitions. Petitioners maintain that the LECs do not provide adequate time for the transition to virtual collocation.[137] Jones Lightwave urges the Commission to require that LECs ensure that virtual collocation arrangements are operating prior to the termination of physical collocation arrangements.[138] MFS demands that LECs refund all nonrecurring charges paid,[139] while ALTS asks the Commission to order LECs to address the refund issue in their tariffs.[140] Some petitioners insist that LECs be required to reimburse interconnectors for charges paid for infrastructure construction,[141] or for any unused deposit fees.[142] Teleport and MCI support Ameritech's treatment of the conversion to virtual collocation as primarily a billing function, with no physical change to the equipment required, and no associated nonrecurring charge.[143] MFS and Time Warner object to equipment relocation and installation charges.[144] Teleport and Jones Lightwave contest provisions that require interconnectors to purchase new virtual collocation equipment and remove identical physical collocation equipment.[145] Finally, MFS challenges GTOC's title forfeiture provision.[146]

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[135] BellSouth Tariff F.C.C. No. 1, Transmittal No. 233, § 20.1.

[136] GTE Telephone Operating Companies Tariff F.C.C. No. 1, Transmittal No. 905, § 17.7.1.

[137] MFS Petition at 9-11.

[138] Jones Lightwave Comments at 5.

[139] MFS Petition at 12.

[140] ALTS Petition at 22-23.

[141] Teleport Petition, App. A, Item 6 at 3.

[142] Time Warner Petition at 6.

[143] Teleport Petition, App. A, Item 6 at 2; MCI Petition at 21. MCI challenges the need to remove existing equipment, other than the collocation cage. Id.

[144] MFS Petition at 12; Time Warner Petition at 7.

[145] Teleport Petition, App. A, Item 6 at 2; Jones Lightwave Petition at 5.

[146] MFS Petition at 9.

69. Replies. LECs respond that they have provided collocators with ample opportunity to convert physical to virtual collocation arrangements.[147] Moreover, they argue, interconnectors entered into uncertain physical collocation arrangements at their own risk, with full knowledge that such arrangements were facing legal challenge.[148] Bell Atlantic claims that because the Commission has delegated consideration of transition issues to the Bureau, these issues are improperly raised in petitions against the tariffs.[149] US West asserts that the Commission lacks the authority under Title II to require carriers to tariff the details of the transition.[150] According to US West, an interconnector that disagrees with US West's transition plan should file a complaint pursuant to Section 208 of the Communications Act.[151]

70. LECs argue that there is no legal or policy justification for requiring them to refund amounts that collocators paid for physical collocation services.[152] They insist that nonrecurring charges were used for necessary capital expenditures,[153] and deny that they will derive any benefit from infrastructure modifications.[154] GTE and BellSouth argue that interconnectors assumed the risk that expenditures might be lost.[155] US West asserts that Commission-ordered refunds would involve the unlawful taking of property.[156] SWB submits that it will ensure that interconnectors receive refunds for unused portions of deposits made for physical collocation.[157] BellSouth asserts that it will refund all space preparation charges and space construction charges that were received in connection with physical collocation.[158]

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[147] Bell Atlantic Reply at 13; SWB Reply at 6-7.

[148] Ameritech Reply at 12; Bell Atlantic Reply at 13-14; BellSouth Reply at 16-17; US West Reply at 4-5; GTE Reply at 5; SWB Reply at 8-9.

[149] Bell Atlantic Reply at 15.

[150] US West Reply at 54.

[151] Id. at 55.

[152] Bell Atlantic Reply at 14-15; GTE Reply at 7-8.

[153] GTE Reply at 8-9; US West Reply at 5-6.

[154] Ameritech Reply at 12; GTE Reply at 7.

[155] GTE Reply at 7-8; BellSouth Reply at 16-17.

[156] US West Reply at 5 n.13. See also SWB Reply at 8.

[157] SWB Reply at 10.

[158] BellSouth Reply at 18.

71. LECs object to assertions that conversion to virtual collocation involves only a billing change. GTE, SWB, and BellSouth assert that under virtual collocation, it is necessary to move dedicated equipment closer to LEC equipment in order to meet required service intervals.[159] US West defends its right to require interconnectors to remove their equipment and purchase LEC-owned interconnector-designated equipment.[160]

72. Discussion. As an initial matter, we conclude that implementation of GTOC's forfeiture provision would constitute an unreasonable practice prohibited by Section 201(b) of the Communications Act. While it is unclear why a collocator would leave behind its costly transmission equipment after the termination date of tariffed physical cross-connection service, we believe it would be an unreasonable practice for GTOC, via its tariff, to assert title to interconnector-owned equipment. Accordingly, we reject GTOC's forfeiture provision as patently unlawful, and order GTOC to remove this provision from its tariff.

73. In addition, we conclude that GTOC's provision regarding LEC payment of refunds for nonrecurring charges associated with physical collocation is unreasonably vague, in violation of the Commission's rules requiring "clear and unambiguous" tariff provisions.[161] GTOC's tariff states that GTOC "is not required to refund any portion of the nonrecurring charges or fees associated with physical EIS arrangements which are converted to virtual."[162] GTOC's provision, however, does not specify whether it, in fact, will pay refunds to interconnectors in some circumstances -- even if it claims it is not obligated to do so. Nor does GTOC's provision specify the terms and conditions under which refunds may be made. By contrast, SWB's tariff clearly states that SWB will refund any portion of the advance payment which has not been expended in working on an interconnector's order. BellSouth's tariff is equally clear that BellSouth will, at the time the customer chooses either to discontinue the physical collocation arrangement or convert it to a virtual collocation arrangement, refund the space preparation and space construction charges as set forth in BellSouth's tariff. Thus, we reject GTOC's vague provision as patently unlawful, and we order GTOC to remove this provision from its tariff.

74. We also find that, based on the record before us, SWB's and BellSouth's refund provisions appear, as a general matter, to be reasonable. We note, however, that application of these provisions in particular circumstances may give rise to disputes that

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[159] GTE Reply at 10; SWB Reply at 11; BellSouth Reply at 18. BellSouth states that it will waive all administrative charges associated with converting physical collocation arrangements to virtual collocation arrangements. Id. at 17.

[160] US West Reply at 55.

[161] See 47 C.F.R. § 61.54.

[162] GTE Telephone Operating Companies Tariff F.C.C. No. 1, Transmittal No. 905, § 17.7.1 (emphasis supplied).

should be resolved through complaints filed pursuant to Section 208 of the Communications Act, 47 U.S.C. § 208. The Bureau will address such complaints as they arise. In addition, the Bureau generally will resolve any other disputes that may arise from the transition from physical to virtual collocation on a case-by-case basis, as directed by the Virtual Collocation Order.[163]

IV. CONCLUSION

75. We have reviewed the LECs' permanent virtual collocation tariffs and accompanying supporting documentation, as well as the pleadings filed by the parties, and have concluded that most of the filed rates are likely to be unreasonably high. We are therefore partially suspending those rates while we investigate their lawfulness. We believe that our partial rate suspension will prevent apparently unreasonable rates from taking effect, while permitting rates that do not appear to be unreasonable to become effective, subject to an investigation and an accounting order. We also reject certain patently unlawful terms and conditions proposed by several LECs and order certain of the LECs to make other tariff revisions.

76. The actions taken in our order should ensure that expanded interconnection through virtual collocation is available under rates, terms, and conditions that will promote economically efficient competition during the pendency of our investigation. We will address the other issues concerning rate levels, rate structures, and terms and conditions that have been raised with respect to both the interim and permanent virtual tariffs in a subsequent order that will designate specific issues for investigation and establish a pleading cycle for discussion of those issues. As part of the investigation initiated in this order, LECs may required to make additional showings, to be specified in our designation order.

V. ORDERING CLAUSES

77. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions filed under the captioned transmittals, and all future revisions modifying these transmittals, ARE SUSPENDED IN PART. For each rate appearing in each of the captioned transmittals, the entire rate IS SUSPENDED for one day, and for the remainder of the five-month suspension period the part of the rate that exceeds the levels justified by the present record, pursuant to Appendix C, IS SUSPENDED for five months. The local exchange carriers listed in Appendix C are ordered to issue tariff revisions in compliance with this Order, reflecting the one-day suspension and employing the Rate Adjustment Factors, where warranted, no later than December 13, 1994, with a scheduled effective date of December 15, 1994.

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[163] Virtual Collocation Order, 9 FCC Rcd at 5178.

78. IT IS FURTHER ORDERED that , pursuant to Sections 4(i), 204(a), 205(a), and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), 205(a), and 403, an investigation IS INSTITUTED into the lawfulness of the tariff revisions filed under the captioned transmittals, and all future tariff revisions modifying these transmittals.

79. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i) and 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the local exchange carriers filing the captioned transmittals and any subsequent related transmittals SHALL KEEP ACCURATE ACCOUNT of all earnings, costs, and returns associated with the rates that are the subject of this investigation, and of all amounts paid thereunder and by whom such amounts are paid.

80. IT IS FURTHER ORDERED that the tariff revisions filed by BellSouth Telecommunications, Inc., GTE System Telephone Companies, GTE Telephone Operating Companies, and Southwestern Bell Telephone Company, which provide for individual case basis (ICB) pricing for training of local exchange carrier personnel to install, maintain, and repair interconnector-designated virtual collocation equipment, ARE UNLAWFUL, and these local exchange carriers SHALL FILE tariff revisions no later than December 23, 1994, on 15 days' notice, deleting any references to ICB pricing for training in their virtual collocation tariffs, and replacing them with specific rates or time and materials charges.

81. IT IS FURTHER ORDERED that, pursuant to Section 61.54 of the Commission's Rules, 47 C.F.R. § 61.54, the tariff revisions of US West Communications, Inc. and Ameritech Operating Companies, which provide for recovery of costs to train local exchange carrier personnel to perform equipment installation, maintenance, and repair are unreasonably vague, and therefore ARE UNLAWFUL, and these local exchange carriers SHALL FILE tariff revisions on December 13, 1994, to become effective on December 15, 1994, to clarify their provisions that recover training costs, as specified in paragraph 47, supra.

82. IT IS FURTHER ORDERED that, pursuant to Section 61.54 of the Commission's Rules, 47 C.F.R. § 61.54, the tariff revisions filed by BellSouth Telecommunications, Inc., Southwestern Bell Telephone Company, and United and Central Telephone Companies, which propose to recover for "extraordinary costs" that are not specifically and individually listed in their tariffs are unreasonably vague, and therefore ARE UNLAWFUL, and these local exchange carriers SHALL FILE tariff revisions on December 13, 1994, to become effective on December 15, 1994, deleting such provisions from their virtual collocation tariffs.

83. IT IS FURTHER ORDERED that, pursuant to Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), the tariff revisions filed by Southwestern Bell Telephone Company referenced in paragraph 56, supra, ARE UNLAWFUL, and Southwestern Bell Telephone Company SHALL FILE tariff revisions on December 13, 1994, to become effective on December 15, 1994, deleting such provisions from its virtual collocation tariff.

84. IT IS FURTHER ORDERED that, pursuant to Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), the tariff revisions filed by GTE Telephone Operating Companies, which propose a title forfeiture for interconnectors in conjunction with these local exchange carriers' deadline for the transition from physical to virtual collocation arrangements, ARE UNLAWFUL, and these local exchange carriers SHALL FILE tariff revisions on December 13, 1994, to become effective on December 15, 1994, deleting such provisions from their virtual collocation tariffs.

85. IT IS FURTHER ORDERED that, pursuant to Section 61.54 of the Commission's Rules, 47 C.F.R. § 61.54, the tariff revisions filed by GTE Telephone Operating Companies, which state that the companies are "not required" to refund any portion of nonrecurring charges or fees associated with physical collocation arrangements which are converted to virtual, are unreasonably vague, and therefore ARE UNLAWFUL, and these local exchange carriers SHALL FILE tariff revisions on December 13, 1994, to become effective on December 15, 1994, deleting this provision.

86. IT IS FURTHER ORDERED that the petition for extension of time to complete its virtual collocation tariffs filed by U S West Communications, Inc. IS GRANTED.

87. IT IS FURTHER ORDERED that the motions to accept late-filed pleadings filed by Southwestern Bell Telephone Company and United and Central Telephone Companies ARE GRANTED.

88. IT IS FURTHER ORDERED that, for the above purposes, Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59, ARE WAIVED. Local exchange carriers should cite the "DA" Number of this order as the authority for their filings.

89. IT IS FURTHER ORDERED that the petitions for rejection or suspension and investigation of the captioned tariffs filed by the petitioners listed in Appendix B ARE GRANTED to the extent indicated and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

APPENDIX A

LECs Filing Permanent Virtual Collocation Tariffs[1]

Ameritech Operating Companies (Ameritech)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Telecommunications, Inc. (BellSouth)
Cincinnati Bell Telephone Companies (CBT)
GTE System Telephone Companies (GSTC)*
GTE Telephone Operating Companies (GTOC)*
Southwestern Bell Telephone Company (SWB)
United and Central Telephone Companies (United)
US West Communications, Inc. (US West)

*In most instances, GTOC and GSTC are referred to collectively as GTE.

[1] Each LEC listed also filed an opposition to the petition(s) to reject or suspend and investigate filed against it.

APPENDIX B

Parties Filing Petitions to Reject or Suspend and Investigate and the LECs Against Which They Filed

Association for Local Telecommunications Services (ALTS)
(Ameritech, Bell Atlantic, BellSouth, SWB, US West)

Cablevision Lightpath, Inc. (Cablevision)
(Ameritech, Bell Atlantic)

Jones Lightwave, Ltd. (Jones)
(US West)

MCI Communications Corporation (MCI)
(Ameritech, Bell Atlantic, BellSouth, CBT, GTE, SWB, United, US West)

McLeod Telemanagement, Inc. (McLeod)
(US West)

MFS Communications Company, Inc. (MFS)
(Ameritech, Bell Atlantic, BellSouth, CBT, GTE, SWB, United, US West)

Teleport Communications Group, Inc. (Teleport)
(Ameritech, Bell Atlantic, BellSouth, GTE, SWB, US West)

Time Warner Communications Holdings, Inc.
(Ameritech, Bell Atlantic, BellSouth, CBT, GTE, SWB, United, US West)

Appendix C

Overhead Analysis

List of Companies and Study Areas

#	Company	Study Area	Rate Adjustment Factor
1	Ameritech	Illinois	no
2		Indiana	no
3		Michigan	no
4		Ohio	no
5		Wisconsin	no
6	Bell Atlantic	Composite	yes
7	Bell South	Composite	yes
8	Cincinnati Bell	Composite	no
9	GTE System Telephone Companies	Arkansas	yes
10		Arizona	yes
11		California	yes
12		Illinois	yes
13		Missouri	yes
14		Texas	yes
15		Virginia	yes
16		Washington	yes
17	GTE Telephone Operating Companies	California	yes
18		Florida	yes
19		Hawaii	yes
20		Idaho	yes
21		Illinois	yes
22		Indiana	yes
23		Kentucky	yes
24		Michigan	yes
25		Missouri	yes
26		North Carolina	yes
27		Ohio	yes
28		Oklahoma	yes
29		Oregon	yes
30		Pennsylvania	yes
31		South Carolina	yes
32		Texas	yes
33		Washington	yes
34		Wisconsin	yes
35	Southwestern Bell	Composite	yes
36	Sprint / United	Florida	yes
37		Indiana	yes
38		Missouri	yes
39		North Carolina	yes
40		Ohio	yes
41		Pennsylvania	yes
42		Tennessee & Virginia	yes
43	Sprint / Central	Florida	yes
44		Illinois	yes
45		Nevada	yes
46		North Carolina	no
47		Virginia	no
48	U S West	Composite	yes

Bell Atlantic EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect		$2.52	$1.53	1.65	1.35	0.82
2	DS3 X–Connect		$38.45	$23.30	1.65	1.23	0.75
3	DS1 Connection Service		$61.86	$37.49	1.65	1.35	0.82
4	DS3 Connection Service		$237.86	$144.16	1.65	1.23	0.75
5	Cable Support Fee		$240.92	$146.01	1.65	1.23	0.75
6	DS1 X–Connect, install–first	NRC	$720.00	$705.26	1.02	1.02	1.00
7	DS1 X–Connect, install–add'l	NRC	$400.00	$283.81	1.41	1.35	0.96
8	DS1 X–Connect, rearrange–first	NRC	$425.00	$410.90	1.03	1.03	1.00
9	DS1 X–Connect, rearrange–first	NRC	$200.00	$132.34	1.51	1.35	0.89
10	DS3 X–Connect	NRC	$1,800.00	$705.26	2.55	1.23	0.48
11	Design and Planning Fee	NRC	$2,227.58	$2,227.58	1.00	1.00	1.00
12	Equipment Installation	NRC	$5,592.20	$5,592.20	1.00	1.00	1.00
13	Training Fee – Lodging & Meals	NRC	$107.37	$107.37	1.00	1.00	1.00
14	Cable Installation Fee	NRC	$497.26	$497.26	1.00	1.00	1.00

BellSouth EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect		$7.50	$5.76	1.30	1.30	1.00
2	DS3 X–Connect		$62.50	$48.17	1.30	1.17	0.90
3	Cable Support Structure (per cable)		$15.00	$11.41	1.31	1.17	0.89
4	Floor Space (per sq. ft.)		$5.00	$2.74	1.82	1.17	0.64
5	Floor Space (per ampere)		$4.00	$2.98	1.34	1.17	0.87
6	DS1 X–Connect – (1st)	NRC	$155.00	$127.13	1.22	1.22	1.00
7	DS3 X–Connect – (1st)	NRC	$155.00	$129.62	1.20	1.17	0.98
8	DS1 X–Connect – (add'l)	NRC	$14.00	$10.78	1.30	1.30	1.00
9	DS3 X–Connect – (add'l)	NRC	$13.00	$10.15	1.28	1.17	0.91
10	Application Fee	NRC	$3,130.00	$2,446.61	1.28	1.17	0.91
11	Cable Installation (per cable)	NRC	$2,750.00	$2,536.04	1.08	1.08	1.00

GSTC Arkansas EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$2.90	$1.84	1.57	1.24	0.79
2	DS3 X-Connect		$27.55	$17.48	1.58	1.13	0.72
3	Power Equipment-Power Material		$392.63	$264.54	1.48	1.13	0.76
4	Power Equipment-DC Power		$5.55	$5.55	1.00	1.00	1.00
5	Power Equipment-Power Cable		$186.60	$122.28	1.53	1.13	0.74
6	Maintenance Fee – Alarm Network		$46.52	$33.57	1.39	1.13	0.82
7	Maintenance Fee – Terminal Equipment		$124.00	$124.00	1.00	1.00	1.00
14	Power Equipment-Power Material	NRC	$1,281.00	$1,281.00	1.00	1.00	1.00
15	Power Equipment-Power Cable	NRC	$1,643.00	$1,643.00	1.00	1.00	1.00
16	Install Fee – 90 Mbps	NRC	$2,001.60	$2,001.60	1.00	1.00	1.00
17	Install Fee – Per DS3	NRC	$266.88	$266.88	1.00	1.00	1.00
18	Install Fee – Per DS1	NRC	$66.72	$66.72	1.00	1.00	1.00
19	Install Fee – OC3	NRC	$2,001.60	$2,001.60	1.00	1.00	1.00
20	Install Fee – Per DS3	NRC	$266.88	$266.88	1.00	1.00	1.00
21	Install Fee – Per DS1	NRC	$66.72	$66.72	1.00	1.00	1.00
22	Install Fee – OC12	NRC	$2,001.06	$2,001.06	1.00	1.00	1.00
23	Install Fee – Per DS3	NRC	$266.88	$266.88	1.00	1.00	1.00
25	Install Fee – OC48	NRC	$2,668.80	$2,668,80	1.00	1.00	1.00
26	Install Fee – Per DS3	NRC	$266.88	$266.88	1.00	1.00	1.00
28	Engineering Fee – 90 Mbps	NRC	$1,520.64	$1,520.64	1.00	1.00	1.00
29	Engineering Fee – Per DS3	NRC	$190.08	$190.08	1.00	1.00	1.00
30	Engineering Fee – Per DS1	NRC	$190.08	$190.08	1.00	1.00	1.00
31	Engineering Fee – OC3	NRC	$2,280.96	$2,280.96	1.00	1.00	1.00
32	Engineering Fee – Per DS3	NRC	$190.08	$190.08	1.00	1.00	1.00
33	Engineering Fee – Per DS1	NRC	$190.08	$190.08	1.00	1.00	1.00
34	Engineering Fee – OC12	NRC	$3,041.28	$3,041.28	1.00	1.00	1.00
35	Engineering Fee – Per DS3	NRC	$190.08	$190.08	1.00	1.00	1.00
37	Engineering Fee – OC48	NRC	$3,801.60	$3,801.60	1.00	1.00	1.00
38	Engineering Fee – Per DS3	NRC	$190.08	$190.08	1.00	1.00	1.00

GSTC Arizona EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect		$3.75	$2.52	1.49	1.49	1.00
2	DS3 X–Connect		$29.06	$19.52	1.49	1.21	0.81
3	Power Equipment–Power Material		$417.17	$345.23	1.21	1.21	1.00
4	Power Equipment–DC Power		$6.84	$6.84	1.00	1.00	1.00
5	Power Equipment–Power Cable		$180.39	$148.98	1.21	1.21	1.00
6	Maintenance Fee – Alarm Network		$42.90	$36.64	1.17	1.17	1.00
7	Maintenance Fee – Terminal Equipment		$166.00	$166.00	1.00	1.00	1.00
14	Power Equipment–Power Material	NRC	$3,593.00	$3,593.00	1.00	1.00	1.00
15	Power Equipment–Power Cable	NRC	$1,736.00	$1,736.00	1.00	1.00	1.00
16	Install Fee – 90 Mbps	NRC	$2,484.60	$2,484.60	1.00	1.00	1.00
17	Install Fee – Per DS3	NRC	$331.28	$331.28	1.00	1.00	1.00
18	Install Fee – Per DS1	NRC	$82.82	$82.82	1.00	1.00	1.00
19	Install Fee – OC3	NRC	$2,484.60	$2,484.60	1.00	1.00	1.00
20	Install Fee – Per DS3	NRC	$331.28	$331.28	1.00	1.00	1.00
21	Install Fee – Per DS1	NRC	$82.82	$82.82	1.00	1.00	1.00
22	Install Fee – OC12	NRC	$2,484.60	$2,484.60	1.00	1.00	1.00
23	Install Fee – Per DS3	NRC	$331.28	$331.28	1.00	1.00	1.00
25	Install Fee – OC48	NRC	$3,312.80	$3,312.80	1.00	1.00	1.00
26	Install Fee – Per DS3	NRC	$331.28	$331.28	1.00	1.00	1.00
28	Engineering Fee – 90 Mbps	NRC	$1,155.84	$1,155.84	1.00	1.00	1.00
29	Engineering Fee – Per DS3	NRC	$144.48	$144.48	1.00	1.00	1.00
30	Engineering Fee – Per DS1	NRC	$144.48	$144.48	1.00	1.00	1.00
31	Engineering Fee – OC3	NRC	$1,733.76	$1,733.76	1.00	1.00	1.00
32	Engineering Fee – Per DS3	NRC	$144.48	$144.48	1.00	1.00	1.00
33	Engineering Fee – Per DS1	NRC	$144.48	$144.48	1.00	1.00	1.00
34	Engineering Fee – OC12	NRC	$2,311.68	$2,311.68	1.00	1.00	1.00
35	Engineering Fee – Per DS3	NRC	$144.48	$144.48	1.00	1.00	1.00
37	Engineering Fee – OC48	NRC	$2,889.60	$2,889.60	1.00	1.00	1.00
38	Engineering Fee – Per DS3	NRC	$144.48	$144.48	1.00	1.00	1.00

GSTC California EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect		$4.32	$2.64	1.63	1.63	1.00
2	DS3 X–Connect		$35.23	$21.51	1.64	1.02	0.62
3	Power Equipment–Power Material		$501.89	$298.24	1.68	1.02	0.61
4	Power Equipment–DC Power		$7.34	$7.34	1.00	1.00	1.00
5	Power Equipment–Power Cable		$218.13	$128.45	1.70	1.02	0.60
6	Maintenance Fee – Alarm Network		$52.94	$37.91	1.40	1.02	0.73
7	Maintenance Fee – Terminal Equipment		$241.00	$241.00	1.00	1.00	1.00
14	Power Equipment–Power Material	NRC	$6,377.00	$6,377.00	1.00	1.00	1.00
15	Power Equipment–Power Cable	NRC	$3,081.00	$3,081.00	1.00	1.00	1.00
16	Install Fee – 90 Mbps	NRC	$4,011.60	$4,011.60	1.00	1.00	1.00
17	Install Fee – Per DS3	NRC	$534.88	$534.88	1.00	1.00	1.00
18	Install Fee – Per DS1	NRC	$133.72	$133.72	1.00	1.00	1.00
19	Install Fee – OC3	NRC	$4,011.60	$4,011.60	1.00	1.00	1.00
20	Install Fee – Per DS3	NRC	$534.88	$534.88	1.00	1.00	1.00
21	Install Fee – Per DS1	NRC	$133.72	$133.72	1.00	1.00	1.00
22	Install Fee – OC12	NRC	$4,011.60	$4,011.60	1.00	1.00	1.00
23	Install Fee – Per DS3	NRC	$534.88	$534.88	1.00	1.00	1.00
25	Install Fee – OC48	NRC	$5,348.80	$5,348.80	1.00	1.00	1.00
26	Install Fee – Per DS3	NRC	$534.88	$534.88	1.00	1.00	1.00
28	Engineering Fee – 90 Mbps	NRC	$1,558.84	$1,558.84	1.00	1.00	1.00
29	Engineering Fee – Per DS3	NRC	$144.48	$144.48	1.00	1.00	1.00
30	Engineering Fee – Per DS1	NRC	$144.48	$144.48	1.00	1.00	1.00
31	Engineering Fee – OC3	NRC	$1,733.76	$1,733.76	1.00	1.00	1.00
32	Engineering Fee – Per DS3	NRC	$144.48	$144.48	1.00	1.00	1.00
33	Engineering Fee – Per DS1	NRC	$144.48	$144.48	1.00	1.00	1.00
34	Engineering Fee – OC12	NRC	$2,311.68	$2,311.68	1.00	1.00	1.00
35	Engineering Fee – Per DS3	NRC	$144.48	$144.48	1.00	1.00	1.00
37	Engineering Fee – OC48	NRC	$2,889.60	$2,889.60	1.00	1.00	1.00
38	Engineering Fee – Per DS3	NRC	$144.48	$144.48	1.00	1.00	1.00

GSTC Illinois EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect		$3.58	$2.11	1.70	1.70	1.00
2	DS3 X–Connect		$34.36	$20.17	1.70	1.14	0.67
3	Power Equipment–Power Material		$470.15	$282.25	1.67	1.14	0.68
4	Power Equipment–DC Power		$6.21	$6.21	1.00	1.00	1.00
5	Power Equipment–Power Cable		$213.72	$126.03	1.70	1.14	0.67
6	Maintenance Fee – Alarm Network		$51.05	$35.69	1.43	1.14	0.80
7	Maintenance Fee – Terminal Equipment		$138.00	$138.00	1.00	1.00	1.00
14	Power Equipment–Power Material	NRC	$4,613.00	$4,613.00	1.00	1.00	1.00
15	Power Equipment–Power Cable	NRC	$2,691.00	$2,691.00	1.00	1.00	1.00
16	Install Fee – 90 Mbps	NRC	$2,260.20	$2,260.20	1.00	1.00	1.00
17	Install Fee – Per DS3	NRC	$301.36	$301.36	1.00	1.00	1.00
18	Install Fee – Per DS1	NRC	$75.34	$75.34	1.00	1.00	1.00
19	Install Fee – OC3	NRC	$2,260.20	$2,260.20	1.00	1.00	1.00
20	Install Fee – Per DS3	NRC	$301.36	$301.36	1.00	1.00	1.00
21	Install Fee – Per DS1	NRC	$75.34	$75.34	1.00	1.00	1.00
22	Install Fee – OC12	NRC	$2,260.20	$2,260.20	1.00	1.00	1.00
23	Install Fee – Per DS3	NRC	$301.36	$301.36	1.00	1.00	1.00
25	Install Fee – OC48	NRC	$3,013.60	$3,013.60	1.00	1.00	1.00
26	Install Fee – Per DS3	NRC	$301.36	$301.36	1.00	1.00	1.00
28	Engineering Fee – 90 Mbps	NRC	$1,013.60	$1,013.60	1.00	1.00	1.00
29	Engineering Fee – Per DS3	NRC	$126.70	$126.70	1.00	1.00	1.00
30	Engineering Fee – Per DS1	NRC	$126.70	$126.70	1.00	1.00	1.00
31	Engineering Fee – OC3	NRC	$1,520.40	$1,520.40	1.00	1.00	1.00
32	Engineering Fee – Per DS3	NRC	$126.70	$126.70	1.00	1.00	1.00
33	Engineering Fee – Per DS1	NRC	$126.70	$126.70	1.00	1.00	1.00
34	Engineering Fee – OC12	NRC	$2,027.20	$2,027.20	1.00	1.00	1.00
35	Engineering Fee – Per DS3	NRC	$126.70	$126.70	1.00	1.00	1.00
37	Engineering Fee – OC48	NRC	$2,534.00	$2,534.00	1.00	1.00	1.00
38	Engineering Fee – Per DS3	NRC	$126.70	$126.70	1.00	1.00	1.00

GSTC Missouri EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect		$3.72	$2.15	1.73	1.46	0.84
2	DS3 X–Connect		$33.29	$19.21	1.73	1.24	0.72
3	Power Equipment–Power Material		$614.41	$388.07	1.58	1.24	0.78
4	Power Equipment–DC Power		$5.82	$5.82	1.00	1.00	1.00
5	Power Equipment–Power Cable		$222.31	$122.48	1.82	1.24	0.68
6	Maintenance Fee – Alarm Network		$49.69	$32.22	1.54	1.24	0.80
7	Maintenance Fee – Terminal Equipment		$214.00	$214.00	1.00	1.00	1.00
14	Power Equipment–Power Material	NRC	$5,569.00	$5,569.00	1.00	1.00	1.00
15	Power Equipment–Power Cable	NRC	$2,691.00	$2,691.00	1.00	1.00	1.00
16	Install Fee – 90 Mbps	NRC	$3,506.40	$3,506.40	1.00	1.00	1.00
17	Install Fee – Per DS3	NRC	$467.52	$467.52	1.00	1.00	1.00
18	Install Fee – Per DS1	NRC	$116.88	$116.88	1.00	1.00	1.00
19	Install Fee – OC3	NRC	$3,506.40	$3,506.40	1.00	1.00	1.00
20	Install Fee – Per DS3	NRC	$467.52	$467.52	1.00	1.00	1.00
21	Install Fee – Per DS1	NRC	$116.88	$116.88	1.00	1.00	1.00
22	Install Fee – OC12	NRC	$3,506.40	$3,506.40	1.00	1.00	1.00
23	Install Fee – Per DS3	NRC	$467.52	$467.52	1.00	1.00	1.00
25	Install Fee – OC48	NRC	$4,675.20	$4,675.20	1.00	1.00	1.00
26	Install Fee – Per DS3	NRC	$467.52	$467.52	1.00	1.00	1.00
28	Engineering Fee – 90 Mbps	NRC	$1,195.52	$1,195.52	1.00	1.00	1.00
29	Engineering Fee – Per DS3	NRC	$149.44	$149.44	1.00	1.00	1.00
30	Engineering Fee – Per DS1	NRC	$149.44	$149.44	1.00	1.00	1.00
31	Engineering Fee – OC3	NRC	$1,793.28	$1,793.28	1.00	1.00	1.00
32	Engineering Fee – Per DS3	NRC	$149.44	$149.44	1.00	1.00	1.00
33	Engineering Fee – Per DS1	NRC	$149.44	$149.44	1.00	1.00	1.00
34	Engineering Fee – OC12	NRC	$2,391.04	$2,391.04	1.00	1.00	1.00
35	Engineering Fee – Per DS3	NRC	$149.44	$149.44	1.00	1.00	1.00
37	Engineering Fee – OC48	NRC	$2,988.80	$2,988.80	1.00	1.00	1.00
38	Engineering Fee – Per DS3	NRC	$149.44	$149.44	1.00	1.00	1.00

GSTC Texas EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect		$4.47	$3.00	1.49	1.49	1.00
2	DS3 X–Connect		$31.98	$21.43	1.49	1.13	0.76
3	Power Equipment–Power Material		$400.01	$272.68	1.47	1.13	0.77
4	Power Equipment–DC Power		$5.63	$5.63	1.00	1.00	1.00
5	Power Equipment–Power Cable		$186.11	$126.06	1.48	1.13	0.77
6	Maintenance Fee – Alarm Network		$45.22	$33.68	1.34	1.13	0.84
7	Maintenance Fee – Terminal Equipment		$448.00	$448.00	1.00	1.00	1.00
14	Power Equipment–Power Material	NRC	$3,731.00	$3,731.00	1.00	1.00	1.00
15	Power Equipment–Power Cable	NRC	$1,999.00	$1,999.00	1.00	1.00	1.00
16	Install Fee – 90 Mbps	NRC	$7,331.40	$7,331.40	1.00	1.00	1.00
17	Install Fee – Per DS3	NRC	$977.52	$977.52	1.00	1.00	1.00
18	Install Fee – Per DS1	NRC	$244.38	$244.38	1.00	1.00	1.00
19	Install Fee – OC3	NRC	$7,331.40	$7,331.40	1.00	1.00	1.00
20	Install Fee – Per DS3	NRC	$977.52	$977.52	1.00	1.00	1.00
21	Install Fee – Per DS1	NRC	$244.38	$244.38	1.00	1.00	1.00
22	Install Fee – OC12	NRC	$7,331.40	$7,331.40	1.00	1.00	1.00
23	Install Fee – Per DS3	NRC	$977.52	$977.52	1.00	1.00	1.00
25	Install Fee – OC48	NRC	$9,775.20	$9,775.20	1.00	1.00	1.00
26	Install Fee – Per DS3	NRC	$977.52	$977.52	1.00	1.00	1.00
28	Engineering Fee – 90 Mbps	NRC	$1,553.12	$1,553.12	1.00	1.00	1.00
29	Engineering Fee – Per DS3	NRC	$194.14	$194.14	1.00	1.00	1.00
30	Engineering Fee – Per DS1	NRC	$194.14	$194.14	1.00	1.00	1.00
31	Engineering Fee – OC3	NRC	$2,329.68	$2,329.68	1.00	1.00	1.00
32	Engineering Fee – Per DS3	NRC	$194.14	$194.14	1.00	1.00	1.00
33	Engineering Fee – Per DS1	NRC	$194.14	$194.14	1.00	1.00	1.00
34	Engineering Fee – OC12	NRC	$3,106.24	$3,106.24	1.00	1.00	1.00
35	Engineering Fee – Per DS3	NRC	$194.14	$194.14	1.00	1.00	1.00
37	Engineering Fee – OC48	NRC	$3,882.80	$3,882.80	1.00	1.00	1.00
38	Engineering Fee – Per DS3	NRC	$194.14	$194.14	1.00	1.00	1.00

GSTC Virginia EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect		$3.56	$2.20	1.62	1.62	1.00
2	DS3 X–Connect		$32.21	$19.88	1.62	1.05	0.65
3	Power Equipment–Power Material		$483.12	$284.71	1.70	1.05	0.62
4	Power Equipment–DC Power		$5.75	$5.75	1.00	1.00	1.00
5	Power Equipment–Power Cable		$210.10	$122.90	1.71	1.05	0.61
6	Maintenance Fee – Alarm Network		$48.88	$32.80	1.49	1.05	0.70
7	Maintenance Fee – Terminal Equipment		$179.00	$179.00	1.00	1.00	1.00
14	Power Equipment–Power Material	NRC	$4,801.00	$4,801.00	1.00	1.00	1.00
15	Power Equipment–Power Cable	NRC	$2,320.00	$2,320.00	1.00	1.00	1.00
16	Install Fee – 90 Mbps	NRC	$2,929.80	$2,929.80	1.00	1.00	1.00
17	Install Fee – Per DS3	NRC	$390.64	$390.64	1.00	1.00	1.00
18	Install Fee – Per DS1	NRC	$97.66	$97.66	1.00	1.00	1.00
19	Install Fee – OC3	NRC	$2,929.80	$2,929.80	1.00	1.00	1.00
20	Install Fee – Per DS3	NRC	$390.64	$390.64	1.00	1.00	1.00
21	Install Fee – Per DS1	NRC	$97.66	$97.66	1.00	1.00	1.00
22	Install Fee – OC12	NRC	$2,929.80	$2,929.80	1.00	1.00	1.00
23	Install Fee – Per DS3	NRC	$390.64	$390.64	1.00	1.00	1.00
25	Install Fee – OC48	NRC	$3,906.40	$3,906.40	1.00	1.00	1.00
26	Install Fee – Per DS3	NRC	$390.64	$390.64	1.00	1.00	1.00
28	Engineering Fee – 90 Mbps	NRC	$1,101.60	$1,101.60	1.00	1.00	1.00
29	Engineering Fee – Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00
30	Engineering Fee – Per DS1	NRC	$137.70	$137.70	1.00	1.00	1.00
31	Engineering Fee – OC3	NRC	$1,652.40	$1,652.40	1.00	1.00	1.00
32	Engineering Fee – Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00
33	Engineering Fee – Per DS1	NRC	$137.70	$137.70	1.00	1.00	1.00
34	Engineering Fee – OC12	NRC	$2,203.20	$2,203.20	1.00	1.00	1.00
35	Engineering Fee – Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00
37	Engineering Fee – OC48	NRC	$2,754.00	$2,754.00	1.00	1.00	1.00
38	Engineering Fee – Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00

GSTC Washington EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect		$3.71	$2.15	1.72	1.72	1.00
2	DS3 X–Connect		$34.81	$20.09	1.73	1.29	0.74
3	Power Equipment–Power Material		$450.66	$256.86	1.75	1.29	0.74
4	Power Equipment–DC Power		$4.99	$4.99	1.00	1.00	1.00
5	Power Equipment–Power Cable		$196.10	$110.80	1.77	1.29	0.73
6	Maintenance Fee – Alarm Network		$51.65	$36.10	1.43	1.29	0.90
7	Maintenance Fee – Terminal Equipment		$167.00	$167.00	1.00	1.00	1.00
14	Power Equipment–Power Material	NRC	$4,987.00	$4,987.00	1.00	1.00	1.00
15	Power Equipment–Power Cable	NRC	$2,409.00	$2,409.00	1.00	1.00	1.00
16	Install Fee – 90 Mbps	NRC	$2,731.80	$2,731.80	1.00	1.00	1.00
17	Install Fee – Per DS3	NRC	$364.24	$364.24	1.00	1.00	1.00
18	Install Fee – Per DS1	NRC	$91.06	$91.06	1.00	1.00	1.00
19	Install Fee – OC3	NRC	$2,731.80	$2,731.80	1.00	1.00	1.00
20	Install Fee – Per DS3	NRC	$364.24	$364.24	1.00	1.00	1.00
21	Install Fee – Per DS1	NRC	$91.06	$91.06	1.00	1.00	1.00
22	Install Fee – OC12	NRC	$2,731.80	$2,731.80	1.00	1.00	1.00
23	Install Fee – Per DS3	NRC	$2,731.80	$2,731.80	1.00	1.00	1.00
25	Install Fee – OC48	NRC	$3,642.40	$3,642.40	1.00	1.00	1.00
26	Install Fee – Per DS3	NRC	$2,731.80	$2,731.80	1.00	1.00	1.00
28	Engineering Fee – 90 Mbps	NRC	$1,346.72	$1,346.72	1.00	1.00	1.00
29	Engineering Fee – Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00
30	Engineering Fee – Per DS1	NRC	$168.34	$168.34	1.00	1.00	1.00
31	Engineering Fee – OC3	NRC	$2,020.08	$2,020.08	1.00	1.00	1.00
32	Engineering Fee – Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00
33	Engineering Fee – Per DS1	NRC	$168.34	$168.34	1.00	1.00	1.00
34	Engineering Fee – OC12	NRC	$2,693.44	$2,693.44	1.00	1.00	1.00
35	Engineering Fee – Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00
37	Engineering Fee – OC48	NRC	$3,366.80	$3,366.80	1.00	1.00	1.00
38	Engineering Fee – Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00

GTOC California Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$3.77	$2.60	1.45	1.23	0.85
2	DS3 X-Connect		$33.21	$22.87	1.45	1.11	0.76
3	Power Equipment-Power Material		$517.16	$322.08	1.61	1.11	0.69
4	Power Equipment-DC Power		$7.58	$7.58	1.00	1.00	1.00
5	Power Equipment-Power Cable		$225.66	$139.10	1.62	1.11	0.68
6	Maintenance Fee - Alarm Network		$48.76	$34.40	1.42	1.11	0.78
7	Maintenance Fee - Terminal Equipment		$160.00	$160.00	1.00	1.00	1.00
8	Power Equipment-Power Material	NRC	$6,377.00	$6,377.00	1.00	1.00	1.00
9	Power Equipment-Power Cable	NRC	$3,081.00	$3,081.00	1.00	1.00	1.00
10	Install Fee - 90 Mbps	NRC	$2,625.00	$2,625.00	1.00	1.00	1.00
11	Install Fee - Per DS3	NRC	$350.00	$350.00	1.00	1.00	1.00
12	Install Fee - Per DS1	NRC	$87.50	$87.50	1.00	1.00	1.00
13	Install Fee - OC3	NRC	$2,625.00	$2,625.00	1.00	1.00	1.00
14	Install Fee - Per DS3	NRC	$350.00	$350.00	1.00	1.00	1.00
15	Install Fee - Per DS1	NRC	$87.50	$87.50	1.00	1.00	1.00
16	Install Fee - OC12	NRC	$2,625.00	$2,625.00	1.00	1.00	1.00
17	Install Fee - Per DS3	NRC	$350.00	$350.00	1.00	1.00	1.00
18	Install Fee - OC48	NRC	$3,500.00	$3,500.00	1.00	1.00	1.00
19	Install Fee - Per DS3	NRC	$350.00	$350.00	1.00	1.00	1.00
20	Engineering Fee - 90 Mbps	NRC	$1,779.04	$1,779.04	1.00	1.00	1.00
21	Engineering Fee - Per DS3	NRC	$222.38	$222.38	1.00	1.00	1.00
22	Engineering Fee - Per DS1	NRC	$222.38	$222.38	1.00	1.00	1.00
23	Engineering Fee - OC3	NRC	$2,668.56	$2,668.56	1.00	1.00	1.00
24	Engineering Fee - Per DS3	NRC	$222.38	$222.38	1.00	1.00	1.00
25	Engineering Fee - Per DS1	NRC	$222.38	$222.38	1.00	1.00	1.00
26	Engineering Fee - OC12	NRC	$3,558.08	$3,558.08	1.00	1.00	1.00
27	Engineering Fee - Per DS3	NRC	$222.38	$222.38	1.00	1.00	1.00
28	Engineering Fee - OC48	NRC	$4,447.60	$4,447.60	1.00	1.00	1.00
29	Engineering Fee - Per DS3	NRC	$222.38	$222.38	1.00	1.00	1.00

GTOC Florida EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$3.80	$2.80	1.36	1.25	0.92
2	DS3 X-Connect		$36.02	$26.51	1.36	1.00	0.74
3	Power Equipment-Power Material		$477.17	$322.01	1.48	1.00	0.67
4	Power Equipment-DC Power		$6.12	$6.12	1.00	1.00	1.00
5	Power Equipment-Power Cable		$206.05	$138.49	1.49	1.00	0.67
6	Maintenance Fee - Alarm Network		$50.11	$36.38	1.38	1.00	0.73
7	Maintenance Fee - Terminal Equipment		$252.00	$252.00	1.00	1.00	1.00
14	Power Equipment-Power Material	NRC	$3,369.00	$3,369.00	1.00	1.00	1.00
15	Power Equipment-Power Cable	NRC	$1,628.00	$1,628.00	1.00	1.00	1.00
16	Install Fee - 90 Mbps	NRC	$1,950.60	$1,950.60	1.00	1.00	1.00
17	Install Fee - Per DS3	NRC	$260.08	$260.08	1.00	1.00	1.00
18	Install Fee - Per DS1	NRC	$65.02	$65.02	1.00	1.00	1.00
19	Install Fee - OC3	NRC	$1,950.60	$1,950.60	1.00	1.00	1.00
20	Install Fee - Per DS3	NRC	$260.08	$260.08	1.00	1.00	1.00
21	Install Fee - Per DS1	NRC	$65.02	$65.02	1.00	1.00	1.00
22	Install Fee - OC12	NRC	$1,950.60	$1,950.60	1.00	1.00	1.00
23	Install Fee - Per DS3	NRC	$260.08	$260.08	1.00	1.00	1.00
25	Install Fee - OC48	NRC	$2,600.80	$2,600.80	1.00	1.00	1.00
26	Install Fee - Per DS3	NRC	$260.08	$260.08	1.00	1.00	1.00
28	Engineering Fee - 90 Mbps	NRC	$1,122.24	$1,122.24	1.00	1.00	1.00
29	Engineering Fee - Per DS3	NRC	$140.28	$140.28	1.00	1.00	1.00
30	Engineering Fee - Per DS1	NRC	$140.28	$140.28	1.00	1.00	1.00
31	Engineering Fee - OC3	NRC	$1,683.36	$1,683.36	1.00	1.00	1.00
32	Engineering Fee - Per DS3	NRC	$140.28	$140.28	1.00	1.00	1.00
33	Engineering Fee - Per DS1	NRC	$140.28	$140.28	1.00	1.00	1.00
34	Engineering Fee - OC12	NRC	$2,244.48	$2,244.48	1.00	1.00	1.00
35	Engineering Fee - Per DS3	NRC	$140.28	$140.28	1.00	1.00	1.00
37	Engineering Fee - OC48	NRC	$2,805.60	$2,805.60	1.00	1.00	1.00
38	Engineering Fee - Per DS3	NRC	$140.28	$140.28	1.00	1.00	1.00

GTOC Hawaii EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$3.38	$2.32	1.46	1.37	0.94
2	DS3 X-Connect		$33.95	$23.29	1.46	1.22	0.84
3	Power Equipment-Power Material		$503.19	$313.86	1.60	1.22	0.76
4	Power Equipment-DC Power		$7.49	$7.49	1.00	1.00	1.00
5	Power Equipment-Power Cable		$219.95	$136.12	1.62	1.22	0.76
6	Maintenance Fee - Alarm Network		$50.28	$36.12	1.39	1.22	0.88
7	Maintenance Fee - Terminal Equipment		$145.00	$145.00	1.00	1.00	1.00
14	Power Equipment-Power Material	NRC	$6,692.00	$6,692.00	1.00	1.00	1.00
15	Power Equipment-Power Cable	NRC	$3,233.00	$3,233.00	1.00	1.00	1.00
16	Install Fee - 90 Mbps	NRC	$2,375.00	$2,375.00	1.00	1.00	1.00
17	Install Fee - Per DS3	NRC	$316.72	$316.72	1.00	1.00	1.00
18	Install Fee - Per DS1	NRC	$79.18	$79.18	1.00	1.00	1.00
19	Install Fee - OC3	NRC	$2,375.40	$2,375.40	1.00	1.00	1.00
20	Install Fee - Per DS3	NRC	$316.72	$316.72	1.00	1.00	1.00
21	Install Fee - Per DS1	NRC	$79.18	$79.18	1.00	1.00	1.00
22	Install Fee - OC12	NRC	$2,375.40	$2,375.40	1.00	1.00	1.00
23	Install Fee - Per DS3	NRC	$316.72	$316.72	1.00	1.00	1.00
25	Install Fee - OC48	NRC	$3,167.20	$3,167.20	1.00	1.00	1.00
26	Install Fee - Per DS3	NRC	$316.72	$316.72	1.00	1.00	1.00
28	Engineering Fee - 90 Mbps	NRC	$1,936.96	$1,936.96	1.00	1.00	1.00
29	Engineering Fee - Per DS3	NRC	$242.12	$242.12	1.00	1.00	1.00
30	Engineering Fee - Per DS1	NRC	$242.12	$242.12	1.00	1.00	1.00
31	Engineering Fee - OC3	NRC	$2,905.44	$2,905.44	1.00	1.00	1.00
32	Engineering Fee - Per DS3	NRC	$242.12	$242.12	1.00	1.00	1.00
33	Engineering Fee - Per DS1	NRC	$242.12	$242.12	1.00	1.00	1.00
34	Engineering Fee - OC12	NRC	$3,873.92	$3,873.92	1.00	1.00	1.00
35	Engineering Fee - Per DS3	NRC	$242.12	$242.12	1.00	1.00	1.00
37	Engineering Fee - OC48	NRC	$4,842.40	$4,842.40	1.00	1.00	1.00
38	Engineering Fee - Per DS3	NRC	$242.12	$242.12	1.00	1.00	1.00

GTOC Idaho EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$3.55	$2.58	1.38	1.36	0.99
2	DS3 X-Connect		$31.29	$22.72	1.38	1.32	0.96
3	Power Equipment-Power Material		$519.58	$382.78	1.36	1.32	0.97
4	Power Equipment-DC Power		$6.25	$6.25	1.00	1.00	1.00
5	Power Equipment-Power Cable		$225.01	$165.31	1.36	1.32	0.97
6	Maintenance Fee - Alarm Network		$55.02	$43.10	1.28	1.28	1.00
7	Maintenance Fee - Terminal Equipment		$167.00	$167.00	1.00	1.00	1.00
14	Power Equipment-Power Material	NRC	$3,508.00	$3,508.00	1.00	1.00	1.00
15	Power Equipment-Power Cable	NRC	$1,695.00	$1,695.00	1.00	1.00	1.00
16	Install Fee - 90 Mbps	NRC	$2,731.80	$2,731.80	1.00	1.00	1.00
17	Install Fee - Per DS3	NRC	$364.24	$364.24	1.00	1.00	1.00
18	Install Fee - Per DS1	NRC	$91.06	$91.06	1.00	1.00	1.00
19	Install Fee - OC3	NRC	$2,731.80	$2,731.80	1.00	1.00	1.00
20	Install Fee - Per DS3	NRC	$364.24	$364.24	1.00	1.00	1.00
21	Install Fee - Per DS1	NRC	$91.06	$91.06	1.00	1.00	1.00
22	Install Fee - OC12	NRC	$2,731.80	$2,731.80	1.00	1.00	1.00
23	Install Fee - Per DS3	NRC	$364.24	$364.24	1.00	1.00	1.00
25	Install Fee - OC48	NRC	$3,642.40	$3,642.40	1.00	1.00	1.00
26	Install Fee - Per DS3	NRC	$364.24	$364.24	1.00	1.00	1.00
28	Engineering Fee - 90 Mbps	NRC	$1,346.72	$1,346.72	1.00	1.00	1.00
29	Engineering Fee - Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00
30	Engineering Fee - Per DS1	NRC	$168.34	$168.34	1.00	1.00	1.00
31	Engineering Fee - OC3	NRC	$2,020.08	$2,020.08	1.00	1.00	1.00
32	Engineering Fee - Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00
33	Engineering Fee - Per DS1	NRC	$168.34	$168.34	1.00	1.00	1.00
34	Engineering Fee - OC12	NRC	$2,693.44	$2,693.44	1.00	1.00	1.00
35	Engineering Fee - Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00
37	Engineering Fee - OC48	NRC	$3,366.80	$3,366.80	1.00	1.00	1.00
38	Engineering Fee - Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00

GTOC Illinois EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$3.40	$2.52	1.35	1.03	0.76
2	DS3 X-Connect		$31.55	$23.36	1.35	1.23	0.91
3	Power Equipment-Power Material		$426.85	$276.95	1.54	1.03	0.67
4	Power Equipment-DC Power		$5.67	$5.67	1.00	1.00	1.00
5	Power Equipment-Power Cable		$193.51	$123.56	1.57	1.03	0.66
6	Maintenance Fee - Alarm Network		$46.69	$34.43	1.36	1.03	0.76
7	Maintenance Fee - Terminal Equipment		$138.00	$138.00	1.00	1.00	1.00
14	Power Equipment-Power Material	NRC	$4,613.00	$4,613.00	1.00	1.00	1.00
15	Power Equipment-Power Cable	NRC	$2,691.00	$2,691.00	1.00	1.00	1.00
16	Install Fee - 90 Mbps	NRC	$2,260.20	$2,260.20	1.00	1.00	1.00
17	Install Fee - Per DS3	NRC	$301.36	$301.36	1.00	1.00	1.00
18	Install Fee - Per DS1	NRC	$75.34	$75.34	1.00	1.00	1.00
19	Install Fee - OC3	NRC	$2,260.20	$2,260.20	1.00	1.00	1.00
20	Install Fee - Per DS3	NRC	$301.36	$301.36	1.00	1.00	1.00
21	Install Fee - Per DS1	NRC	$75.34	$75.34	1.00	1.00	1.00
22	Install Fee - OC12	NRC	$2,260.20	$2,260.20	1.00	1.00	1.00
23	Install Fee - Per DS3	NRC	$301.36	$301.36	1.00	1.00	1.00
25	Install Fee - OC48	NRC	$3,013.60	$3,013.60	1.00	1.00	1.00
26	Install Fee - Per DS3	NRC	$301.36	$301.36	1.00	1.00	1.00
28	Engineering Fee - 90 Mbps	NRC	$1,013.60	$1,013.60	1.00	1.00	1.00
29	Engineering Fee - Per DS3	NRC	$126.70	$126.70	1.00	1.00	1.00
30	Engineering Fee - Per DS1	NRC	$126.70	$126.70	1.00	1.00	1.00
31	Engineering Fee - OC3	NRC	$1,520.40	$1,520.40	1.00	1.00	1.00
32	Engineering Fee - Per DS3	NRC	$126.70	$126.70	1.00	1.00	1.00
33	Engineering Fee - Per DS1	NRC	$126.70	$126.70	1.00	1.00	1.00
34	Engineering Fee - OC12	NRC	$2,027.20	$2,027.20	1.00	1.00	1.00
35	Engineering Fee - Per DS3	NRC	$126.70	$126.70	1.00	1.00	1.00
37	Engineering Fee - OC48	NRC	$2,534.00	$2,534.00	1.00	1.00	1.00
38	Engineering Fee - Per DS3	NRC	$126.70	$126.70	1.00	1.00	1.00

GTOC Indiana EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$3.42	$2.41	1.42	1.36	0.96
2	DS3 X-Connect		$30.68	$21.56	1.42	1.18	0.83
3	Power Equipment-Power Material		$497.96	$296.64	1.68	1.18	0.70
4	Power Equipment-DC Power		$5.39	$5.39	1.00	1.00	1.00
5	Power Equipment-Power Cable		$215.20	$127.23	1.69	1.18	0.70
6	Maintenance Fee - Alarm Network		$49.96	$33.85	1.48	1.18	0.80
7	Maintenance Fee - Terminal Equipment		$145.00	$145.00	1.00	1.00	1.00
14	Power Equipment-Power Material	NRC	$4,904.00	$4,904.00	1.00	1.00	1.00
15	Power Equipment-Power Cable	NRC	$2,369.00	$2,369.00	1.00	1.00	1.00
16	Install Fee - 90 Mbps	NRC	$2,374.20	$2,374.20	1.00	1.00	1.00
17	Install Fee - Per DS3	NRC	$316.56	$316.56	1.00	1.00	1.00
18	Install Fee - Per DS1	NRC	$79.14	$79.14	1.00	1.00	1.00
19	Install Fee - OC3	NRC	$2,374.00	$2,374.00	1.00	1.00	1.00
20	Install Fee - Per DS3	NRC	$316.56	$316.56	1.00	1.00	1.00
21	Install Fee - Per DS1	NRC	$79.14	$79.14	1.00	1.00	1.00
22	Install Fee - OC12	NRC	$2,374.20	$2,374.20	1.00	1.00	1.00
23	Install Fee - Per DS3	NRC	$316.56	$316.56	1.00	1.00	1.00
25	Install Fee - OC48	NRC	$3,165.60	$3,165.60	1.00	1.00	1.00
26	Install Fee - Per DS3	NRC	$316.56	$316.56	1.00	1.00	1.00
28	Engineering Fee - 90 Mbps	NRC	$1,001.28	$1,001.28	1.00	1.00	1.00
29	Engineering Fee - Per DS3	NRC	$125.16	$125.16	1.00	1.00	1.00
30	Engineering Fee - Per DS1	NRC	$125.16	$125.16	1.00	1.00	1.00
31	Engineering Fee - OC3	NRC	$1,501.92	$1,501.92	1.00	1.00	1.00
32	Engineering Fee - Per DS3	NRC	$125.16	$125.16	1.00	1.00	1.00
33	Engineering Fee - Per DS1	NRC	$125.16	$125.16	1.00	1.00	1.00
34	Engineering Fee - OC12	NRC	$2,002.56	$2,002.56	1.00	1.00	1.00
35	Engineering Fee - Per DS3	NRC	$125.16	$125.16	1.00	1.00	1.00
37	Engineering Fee - OC48	NRC	$2,503.20	$2,503.20	1.00	1.00	1.00
38	Engineering Fee - Per DS3	NRC	$125.16	$125.16	1.00	1.00	1.00

GTOC Kentucky EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$3.33	$2.46	1.35	1.35	1.00
2	DS3 X-Connect		$29.65	$21.92	1.35	1.20	0.89
3	Power Equipment-Power Material		$407.22	$266.19	1.53	1.20	0.78
4	Power Equipment-DC Power		$5.08	$5.08	1.00	1.00	1.00
5	Power Equipment-Power Cable		$175.95	$114.37	1.54	1.20	0.78
6	Maintenance Fee - Alarm Network		$45.43	$33.33	1.36	1.20	0.88
7	Maintenance Fee - Terminal Equipment		$178.00	$178.00	1.00	1.00	1.00
14	Power Equipment-Power Material	NRC	$3,801.00	$3,801.00	1.00	1.00	1.00
15	Power Equipment-Power Cable	NRC	$1,836.00	$1,836.00	1.00	1.00	1.00
16	Install Fee - 90 Mbps	NRC	$2,913.60	$2,913.60	1.00	1.00	1.00
17	Install Fee - Per DS3	NRC	$388.48	$388.48	1.00	1.00	1.00
18	Install Fee - Per DS1	NRC	$97.12	$97.12	1.00	1.00	1.00
19	Install Fee - OC3	NRC	$2,913.60	$2,913.60	1.00	1.00	1.00
20	Install Fee - Per DS3	NRC	$388.48	$388.48	1.00	1.00	1.00
21	Install Fee - Per DS1	NRC	$97.12	$97.12	1.00	1.00	1.00
22	Install Fee - OC12	NRC	$2,913.60	$2,913.60	1.00	1.00	1.00
23	Install Fee - Per DS3	NRC	$388.48	$388.48	1.00	1.00	1.00
25	Install Fee - OC48	NRC	$3,884.80	$3,884.80	1.00	1.00	1.00
26	Install Fee - Per DS3	NRC	$388.48	$388.48	1.00	1.00	1.00
28	Engineering Fee - 90 Mbps	NRC	$1,101.60	$1,101.60	1.00	1.00	1.00
29	Engineering Fee - Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00
30	Engineering Fee - Per DS1	NRC	$137.70	$137.70	1.00	1.00	1.00
31	Engineering Fee - OC3	NRC	$1,685.40	$1,685.40	1.00	1.00	1.00
32	Engineering Fee - Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00
33	Engineering Fee - Per DS1	NRC	$137.70	$137.70	1.00	1.00	1.00
34	Engineering Fee - OC12	NRC	$2,203.20	$2,203.20	1.00	1.00	1.00
35	Engineering Fee - Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00
37	Engineering Fee - OC48	NRC	$2,754.00	$2,754.00	1.00	1.00	1.00
38	Engineering Fee - Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00

GTOC Michigan EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$3.16	$2.28	1.39	1.39	1.00
2	DS3 X-Connect		$28.48	$20.49	1.39	1.39	1.00
3	Power Equipment-Power Material		$399.39	$259.04	1.54	1.44	0.93
4	Power Equipment-DC Power		$5.98	$5.98	1.00	1.00	1.00
5	Power Equipment-Power Cable		$172.12	$111.13	1.55	1.44	0.93
6	Maintenance Fee - Alarm Network		$45.55	$32.69	1.39	1.39	1.00
7	Maintenance Fee - Terminal Equipment		$137.00	$137.00	1.00	1.00	1.00
14	Power Equipment-Power Material	NRC	$2,800.00	$2,800.00	1.00	1.00	1.00
15	Power Equipment-Power Cable	NRC	$1,353.00	$1,353.00	1.00	1.00	1.00
16	Install Fee - 90 Mbps	NRC	$2,248.20	$2,248.20	1.00	1.00	1.00
17	Install Fee - Per DS3	NRC	$299.76	$299.76	1.00	1.00	1.00
18	Install Fee - Per DS1	NRC	$74.94	$74.94	1.00	1.00	1.00
19	Install Fee - OC3	NRC	$2,248.20	$2,248.20	1.00	1.00	1.00
20	Install Fee - Per DS3	NRC	$299.76	$299.76	1.00	1.00	1.00
21	Install Fee - Per DS1	NRC	$74.94	$74.94	1.00	1.00	1.00
22	Install Fee - OC12	NRC	$2,248.20	$2,248.20	1.00	1.00	1.00
23	Install Fee - Per DS3	NRC	$299.76	$299.76	1.00	1.00	1.00
25	Install Fee - OC48	NRC	$2,997.60	$2,997.60	1.00	1.00	1.00
26	Install Fee - Per DS3	NRC	$299.76	$299.76	1.00	1.00	1.00
28	Engineering Fee - 90 Mbps	NRC	$1,089.44	$1,089.44	1.00	1.00	1.00
29	Engineering Fee - Per DS3	NRC	$136.18	$136.18	1.00	1.00	1.00
30	Engineering Fee - Per DS1	NRC	$136.18	$136.18	1.00	1.00	1.00
31	Engineering Fee - OC3	NRC	$1,634.16	$1,634.16	1.00	1.00	1.00
32	Engineering Fee - Per DS3	NRC	$136.18	$136.18	1.00	1.00	1.00
33	Engineering Fee - Per DS1	NRC	$136.18	$136.18	1.00	1.00	1.00
34	Engineering Fee - OC12	NRC	$2,178.88	$2,178.88	1.00	1.00	1.00
35	Engineering Fee - Per DS3	NRC	$136.18	$136.18	1.00	1.00	1.00
37	Engineering Fee - OC48	NRC	$2,732.60	$2,732.60	1.00	1.00	1.00
38	Engineering Fee - Per DS3	NRC	$136.18	$136.18	1.00	1.00	1.00

GTOC Missouri EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$3.35	$2.33	1.44	1.41	0.98
2	DS3 X-Connect		$29.91	$20.79	1.44	1.44	1.00
3	Power Equipment-Power Material		$445.83	$272.00	1.64	1.41	0.86
4	Power Equipment-DC Power		$4.66	$4.66	1.00	1.00	1.00
5	Power Equipment-Power Cable		$194.16	$117.49	1.65	1.41	0.85
6	Maintenance Fee - Alarm Network		$45.89	$32.46	1.41	1.41	1.00
7	Maintenance Fee - Terminal Equipment		$214.00	$214.00	1.00	1.00	1.00
14	Power Equipment-Power Material	NRC	$5,569.00	$5,569.00	1.00	1.00	1.00
15	Power Equipment-Power Cable	NRC	$2,691.00	$2,691.00	1.00	1.00	1.00
16	Install Fee - 90 Mbps	NRC	$3,506.40	$3,506.40	1.00	1.00	1.00
17	Install Fee - Per DS3	NRC	$467.52	$467.52	1.00	1.00	1.00
18	Install Fee - Per DS1	NRC	$116.88	$116.88	1.00	1.00	1.00
19	Install Fee - OC3	NRC	$3,506.40	$3,506.40	1.00	1.00	1.00
20	Install Fee - Per DS3	NRC	$467.52	$467.52	1.00	1.00	1.00
21	Install Fee - Per DS1	NRC	$116.88	$116.88	1.00	1.00	1.00
22	Install Fee - OC12	NRC	$3,506.40	$3,506.40	1.00	1.00	1.00
23	Install Fee - Per DS3	NRC	$467.52	$467.52	1.00	1.00	1.00
25	Install Fee - OC48	NRC	$4,675.20	$4,675.20	1.00	1.00	1.00
26	Install Fee - Per DS3	NRC	$467.52	$467.52	1.00	1.00	1.00
28	Engineering Fee - 90 Mbps	NRC	$1,793.28	$1,793.28	1.00	1.00	1.00
29	Engineering Fee - Per DS3	NRC	$149.44	$149.44	1.00	1.00	1.00
30	Engineering Fee - Per DS1	NRC	$149.44	$149.44	1.00	1.00	1.00
31	Engineering Fee - OC3	NRC	$2,391.04	$2,391.04	1.00	1.00	1.00
32	Engineering Fee - Per DS3	NRC	$149.44	$149.44	1.00	1.00	1.00
33	Engineering Fee - Per DS1	NRC	$149.44	$149.44	1.00	1.00	1.00
34	Engineering Fee - OC12	NRC	$2,988.80	$2,988.80	1.00	1.00	1.00
35	Engineering Fee - Per DS3	NRC	$149.44	$149.44	1.00	1.00	1.00
37	Engineering Fee - OC48	NRC	$2,988.80	$2,988.80	1.00	1.00	1.00
38	Engineering Fee - Per DS3	NRC	$149.44	$149.44	1.00	1.00	1.00

GTOC North Carolina EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect		$4.51	$2.83	1.59	1.45	0.91
2	DS3 X–Connect		$37.16	$23.33	1.59	1.14	0.72
3	Power Equipment–Power Material		$440.29	$262.95	1.67	1.14	0.68
4	Power Equipment–DC Power		$5.53	$5.53	1.00	1.00	1.00
5	Power Equipment–Power Cable		$189.64	$112.64	1.68	1.14	0.68
6	Maintenance Fee – Alarm Network		$51.12	$35.04	1.46	1.14	0.78
7	Maintenance Fee – Terminal Equipment		$178.00	$178.00	1.00	1.00	1.00
14	Power Equipment–Power Material	NRC	$2,995.00	$2,995.00	1.00	1.00	1.00
15	Power Equipment–Power Cable	NRC	$1,447.00	$1,447.00	1.00	1.00	1.00
16	Install Fee – 90 Mbps	NRC	$2,920.80	$2,920.80	1.00	1.00	1.00
17	Install Fee – Per DS3	NRC	$389.44	$389.44	1.00	1.00	1.00
18	Install Fee – Per DS1	NRC	$97.36	$97.36	1.00	1.00	1.00
19	Install Fee – OC3	NRC	$2,920.80	$2,920.80	1.00	1.00	1.00
20	Install Fee – Per DS3	NRC	$389.44	$389.44	1.00	1.00	1.00
21	Install Fee – Per DS1	NRC	$97.36	$97.36	1.00	1.00	1.00
22	Install Fee – OC12	NRC	$2,920.80	$2,920.80	1.00	1.00	1.00
23	Install Fee – Per DS3	NRC	$389.44	$389.44	1.00	1.00	1.00
25	Install Fee – OC48	NRC	$3,894.40	$3,894.40	1.00	1.00	1.00
26	Install Fee – Per DS3	NRC	$389.44	$389.44	1.00	1.00	1.00
28	Engineering Fee – 90 Mbps	NRC	$1,101.60	$1,101.60	1.00	1.00	1.00
29	Engineering Fee – Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00
30	Engineering Fee – Per DS1	NRC	$137.70	$137.70	1.00	1.00	1.00
31	Engineering Fee – OC3	NRC	$1,652.40	$1,652.40	1.00	1.00	1.00
32	Engineering Fee – Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00
33	Engineering Fee – Per DS1	NRC	$137.70	$137.70	1.00	1.00	1.00
34	Engineering Fee – OC12	NRC	$2,203.20	$2,203.20	1.00	1.00	1.00
35	Engineering Fee – Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00
37	Engineering Fee – OC48	NRC	$2,754.00	$2,754.00	1.00	1.00	1.00
38	Engineering Fee – Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00

GTOC Ohio EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$3.56	$2.59	1.37	1.35	0.98
2	DS3 X-Connect		$32.82	$23.87	1.38	1.26	0.92
3	Power Equipment-Power Material		$474.48	$317.84	1.49	1.26	0.84
4	Power Equipment-DC Power		$6.57	$6.57	1.00	1.00	1.00
5	Power Equipment-Power Cable		$206.25	$137.44	1.50	1.26	0.84
6	Maintenance Fee - Alarm Network		$49.22	$36.30	1.36	1.26	0.93
7	Maintenance Fee - Terminal Equipment		$140.00	$140.00	1.00	1.00	1.00
14	Power Equipment-Power Material	NRC	$4,686.00	$4,686.00	1.00	1.00	1.00
15	Power Equipment-Power Cable	NRC	$2,264.00	$2,264.00	1.00	1.00	1.00
16	Install Fee - 90 Mbps	NRC	$2,290.20	$2,290.20	1.00	1.00	1.00
17	Install Fee - Per DS3	NRC	$305.36	$305.36	1.00	1.00	1.00
18	Install Fee - Per DS1	NRC	$76.34	$76.34	1.00	1.00	1.00
19	Install Fee - OC3	NRC	$2,290.20	$2,290.20	1.00	1.00	1.00
20	Install Fee - Per DS3	NRC	$305.36	$305.36	1.00	1.00	1.00
21	Install Fee - Per DS1	NRC	$76.34	$76.34	1.00	1.00	1.00
22	Install Fee - OC12	NRC	$2,290.20	$2,290.20	1.00	1.00	1.00
23	Install Fee - Per DS3	NRC	$305.36	$305.36	1.00	1.00	1.00
25	Install Fee - OC48	NRC	$3,053.60	$3,053.60	1.00	1.00	1.00
26	Install Fee - Per DS3	NRC	$305.36	$305.36	1.00	1.00	1.00
28	Engineering Fee - 90 Mbps	NRC	$1,093.60	$1,093.60	1.00	1.00	1.00
29	Engineering Fee - Per DS3	NRC	$136.70	$136.70	1.00	1.00	1.00
30	Engineering Fee - Per DS1	NRC	$136.70	$136.70	1.00	1.00	1.00
31	Engineering Fee - OC3	NRC	$1,640.40	$1,640.40	1.00	1.00	1.00
32	Engineering Fee - Per DS3	NRC	$136.70	$136.70	1.00	1.00	1.00
33	Engineering Fee - Per DS1	NRC	$136.70	$136.70	1.00	1.00	1.00
34	Engineering Fee - OC12	NRC	$2,187.20	$2,187.20	1.00	1.00	1.00
35	Engineering Fee - Per DS3	NRC	$136.70	$136.70	1.00	1.00	1.00
37	Engineering Fee - OC48	NRC	$2,734.00	$2,734.00	1.00	1.00	1.00
38	Engineering Fee - Per DS3	NRC	$136.70	$136.70	1.00	1.00	1.00

GTOC Oklahoma EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$2.81	$2.12	1.33	1.29	0.97
2	DS3 X-Connect		$24.78	$18.63	1.33	1.33	1.00
3	Power Equipment-Power Material		$395.06	$279.50	1.41	1.29	0.91
4	Power Equipment-DC Power		$6.18	$6.18	1.00	1.00	1.00
5	Power Equipment-Power Cable		$170.53	$120.15	1.42	1.29	0.91
6	Maintenance Fee - Alarm Network		$42.51	$32.36	1.31	1.29	0.98
7	Maintenance Fee - Terminal Equipment		$153.00	$153.00	1.00	1.00	1.00
14	Power Equipment-Power Material	NRC	$3,434.00	$3,434.00	1.00	1.00	1.00
15	Power Equipment-Power Cable	NRC	$1,659.00	$1,659.00	1.00	1.00	1.00
16	Install Fee - 90 Mbps	NRC	$2,500.20	$2,500.20	1.00	1.00	1.00
17	Install Fee - Per DS3	NRC	$333.36	$333.36	1.00	1.00	1.00
18	Install Fee - Per DS1	NRC	$83.34	$83.34	1.00	1.00	1.00
19	Install Fee - OC3	NRC	$2,500.20	$2,500.20	1.00	1.00	1.00
20	Install Fee - Per DS3	NRC	$333.36	$333.36	1.00	1.00	1.00
21	Install Fee - Per DS1	NRC	$83.34	$83.34	1.00	1.00	1.00
22	Install Fee - OC12	NRC	$2,500.20	$2,500.20	1.00	1.00	1.00
23	Install Fee - Per DS3	NRC	$333.36	$333.36	1.00	1.00	1.00
25	Install Fee - OC48	NRC	$3,333.60	$3,333.60	1.00	1.00	1.00
26	Install Fee - Per DS3	NRC	$333.36	$333.36	1.00	1.00	1.00
28	Engineering Fee - 90 Mbps	NRC	$1,210.08	$1,210.08	1.00	1.00	1.00
29	Engineering Fee - Per DS3	NRC	$151.26	$151.26	1.00	1.00	1.00
30	Engineering Fee - Per DS1	NRC	$151.26	$151.26	1.00	1.00	1.00
31	Engineering Fee - OC3	NRC	$1,815.12	$1,815.12	1.00	1.00	1.00
32	Engineering Fee - Per DS3	NRC	$151.26	$151.26	1.00	1.00	1.00
33	Engineering Fee - Per DS1	NRC	$151.26	$151.26	1.00	1.00	1.00
34	Engineering Fee - OC12	NRC	$2,420.16	$2,420.16	1.00	1.00	1.00
35	Engineering Fee - Per DS3	NRC	$151.26	$151.26	1.00	1.00	1.00
37	Engineering Fee - OC48	NRC	$3,025.20	$3,025.20	1.00	1.00	1.00
38	Engineering Fee - Per DS3	NRC	$151.26	$151.26	1.00	1.00	1.00

GTOC Oregon EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$3.68	$2.64	1.39	1.10	0.79
2	DS3 X-Connect		$31.93	$22.93	1.39	1.24	0.89
3	Power Equipment-Power Material		$439.01	$284.43	1.54	1.10	0.71
4	Power Equipment-DC Power		$5.26	$5.26	1.00	1.00	1.00
5	Power Equipment-Power Cable		$192.18	$124.17	1.55	1.10	0.71
6	Maintenance Fee - Alarm Network		$44.96	$32.40	1.39	1.10	0.79
7	Maintenance Fee - Terminal Equipment		$167.00	$167.00	1.00	1.00	1.00
14	Power Equipment-Power Material	NRC	$4,711.00	$4,711.00	1.00	1.00	1.00
15	Power Equipment-Power Cable	NRC	$2,272.00	$2,272.00	1.00	1.00	1.00
16	Install Fee - 90 Mbps	NRC	$2,731.80	$2,731.80	1.00	1.00	1.00
17	Install Fee - Per DS3	NRC	$364.24	$364.24	1.00	1.00	1.00
18	Install Fee - Per DS1	NRC	$91.06	$91.06	1.00	1.00	1.00
19	Install Fee - OC3	NRC	$2,731.80	$2,731.80	1.00	1.00	1.00
20	Install Fee - Per DS3	NRC	$364.24	$364.24	1.00	1.00	1.00
21	Install Fee - Per DS1	NRC	$91.06	$91.06	1.00	1.00	1.00
22	Install Fee - OC12	NRC	$2,731.80	$2,731.80	1.00	1.00	1.00
23	Install Fee - Per DS3	NRC	$364.24	$364.24	1.00	1.00	1.00
25	Install Fee - OC48	NRC	$3,642.40	$3,642.40	1.00	1.00	1.00
26	Install Fee - Per DS3	NRC	$364.24	$364.24	1.00	1.00	1.00
28	Engineering Fee - 90 Mbps	NRC	$1,346.72	$1,346.72	1.00	1.00	1.00
29	Engineering Fee - Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00
30	Engineering Fee - Per DS1	NRC	$168.34	$168.34	1.00	1.00	1.00
31	Engineering Fee - OC3	NRC	$2,020.08	$2,020.08	1.00	1.00	1.00
32	Engineering Fee - Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00
33	Engineering Fee - Per DS1	NRC	$168.34	$168.34	1.00	1.00	1.00
34	Engineering Fee - OC12	NRC	$2,693.44	$2,693.44	1.00	1.00	1.00
35	Engineering Fee - Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00
37	Engineering Fee - OC48	NRC	$3,366.80	$3,366.80	1.00	1.00	1.00
38	Engineering Fee - Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00

GTOC Pennsylvania EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$3.69	$2.72	1.35	1.00	0.74
2	DS3 X-Connect		$33.55	$24.74	1.36	1.20	0.89
3	Power Equipment-Power Material		$499.55	$342.59	1.46	1.00	0.69
4	Power Equipment-DC Power		$6.63	$6.63	1.00	1.00	1.00
5	Power Equipment-Power Cable		$217.08	$148.20	1.46	1.00	0.68
6	Maintenance Fee - Alarm Network		$53.19	$40.12	1.33	1.00	0.75
7	Maintenance Fee - Terminal Equipment		$146.00	$146.00	1.00	1.00	1.00
14	Power Equipment-Power Material	NRC	$4,532.00	$4,532.00	1.00	1.00	1.00
15	Power Equipment-Power Cable	NRC	$2,190.00	$2,190.00	1.00	1.00	1.00
16	Install Fee - 90 Mbps	NRC	$2,386.20	$2,386.20	1.00	1.00	1.00
17	Install Fee - Per DS3	NRC	$318.16	$318.16	1.00	1.00	1.00
18	Install Fee - Per DS1	NRC	$79.54	$79.54	1.00	1.00	1.00
19	Install Fee - OC3	NRC	$2,386.20	$2,386.20	1.00	1.00	1.00
20	Install Fee - Per DS3	NRC	$318.16	$318.16	1.00	1.00	1.00
21	Install Fee - Per DS1	NRC	$79.54	$79.54	1.00	1.00	1.00
22	Install Fee - OC12	NRC	$2,386.20	$2,386.20	1.00	1.00	1.00
23	Install Fee - Per DS3	NRC	$318.16	$318.16	1.00	1.00	1.00
25	Install Fee - OC48	NRC	$3,181.60	$3,181.60	1.00	1.00	1.00
26	Install Fee - Per DS3	NRC	$318.16	$318.16	1.00	1.00	1.00
28	Engineering Fee - 90 Mbps	NRC	$923.52	$923.52	1.00	1.00	1.00
29	Engineering Fee - Per DS3	NRC	$115.44	$115.44	1.00	1.00	1.00
30	Engineering Fee - Per DS1	NRC	$115.44	$115.44	1.00	1.00	1.00
31	Engineering Fee - OC3	NRC	$1,385.28	$1,385.28	1.00	1.00	1.00
32	Engineering Fee - Per DS3	NRC	$115.44	$115.44	1.00	1.00	1.00
33	Engineering Fee - Per DS1	NRC	$115.44	$115.44	1.00	1.00	1.00
34	Engineering Fee - OC12	NRC	$1,847.04	$1,847.04	1.00	1.00	1.00
35	Engineering Fee - Per DS3	NRC	$115.44	$115.44	1.00	1.00	1.00
37	Engineering Fee - OC48	NRC	$2,308.80	$2,308.80	1.00	1.00	1.00
38	Engineering Fee - Per DS3	NRC	$115.44	$115.44	1.00	1.00	1.00

GTOC South Carolina EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect		$4.07	$2.98	1.37	1.37	1.00
2	DS3 X–Connect		$33.48	$24.46	1.37	1.35	0.99
3	Power Equipment–Power Material		$414.06	$268.21	1.54	1.35	0.87
4	Power Equipment–DC Power		$5.59	$5.59	1.00	1.00	1.00
5	Power Equipment–Power Cable		$178.73	$115.16	1.55	1.35	0.87
6	Maintenance Fee – Alarm Network		$47.36	$34.58	1.37	1.35	0.99
7	Maintenance Fee – Terminal Equipment		$174.00	$174.00	1.00	1.00	1.00
14	Power Equipment–Power Material	NRC	$3,459.00	$3,459.00	1.00	1.00	1.00
15	Power Equipment–Power Cable	NRC	$1,672.00	$1,672.00	1.00	1.00	1.00
16	Install Fee – 90 Mbps	NRC	$2,847.60	$2,847.60	1.00	1.00	1.00
17	Install Fee – Per DS3	NRC	$379.68	$379.68	1.00	1.00	1.00
18	Install Fee – Per DS1	NRC	$94.92	$94.92	1.00	1.00	1.00
19	Install Fee – OC3	NRC	$2,847.60	$2,847.60	1.00	1.00	1.00
20	Install Fee – Per DS3	NRC	$379.68	$379.68	1.00	1.00	1.00
21	Install Fee – Per DS1	NRC	$94.92	$94.92	1.00	1.00	1.00
22	Install Fee – OC12	NRC	$2,847.60	$2,847.60	1.00	1.00	1.00
23	Install Fee – Per DS3	NRC	$379.68	$379.68	1.00	1.00	1.00
25	Install Fee – OC48	NRC	$3,796.80	$3,796.80	1.00	1.00	1.00
26	Install Fee – Per DS3	NRC	$379.68	$379.68	1.00	1.00	1.00
28	Engineering Fee – 90 Mbps	NRC	$1,101.60	$1,101.60	1.00	1.00	1.00
29	Engineering Fee – Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00
30	Engineering Fee – Per DS1	NRC	$137.70	$137.70	1.00	1.00	1.00
31	Engineering Fee – OC3	NRC	$1,652.40	$1,652.40	1.00	1.00	1.00
32	Engineering Fee – Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00
33	Engineering Fee – Per DS1	NRC	$137.70	$137.70	1.00	1.00	1.00
34	Engineering Fee – OC12	NRC	$2,203.20	$2,203.20	1.00	1.00	1.00
35	Engineering Fee – Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00
37	Engineering Fee – OC48	NRC	$2,754.00	$2,754.00	1.00	1.00	1.00
38	Engineering Fee – Per DS3	NRC	$137.70	$137.70	1.00	1.00	1.00

GTOC Texas EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$3.17	$2.33	1.36	1.22	0.90
2	DS3 X-Connect		$28.00	$20.57	1.36	1.23	0.90
3	Power Equipment-Power Material		$400.82	$267.95	1.50	1.22	0.82
4	Power Equipment-DC Power		$5.58	$5.58	1.00	1.00	1.00
5	Power Equipment-Power Cable		$185.61	$123.22	1.51	1.22	0.81
6	Maintenance Fee - Alarm Network		$45.42	$33.43	1.36	1.22	0.90
7	Maintenance Fee - Terminal Equipment		$153.00	$153.00	1.00	1.00	1.00
14	Power Equipment-Power Material	NRC	$3,731.00	$3,731.00	1.00	1.00	1.00
15	Power Equipment-Power Cable	NRC	$1,999.00	$1,999.00	1.00	1.00	1.00
16	Install Fee - 90 Mbps	NRC	$2,500.20	$2,500.20	1.00	1.00	1.00
17	Install Fee - Per DS3	NRC	$333.36	$333.36	1.00	1.00	1.00
18	Install Fee - Per DS1	NRC	$83.34	$83.34	1.00	1.00	1.00
19	Install Fee - OC3	NRC	$2,500.20	$2,500.20	1.00	1.00	1.00
20	Install Fee - Per DS3	NRC	$333.36	$333.36	1.00	1.00	1.00
21	Install Fee - Per DS1	NRC	$83.34	$83.34	1.00	1.00	1.00
22	Install Fee - OC12	NRC	$2,500.20	$2,500.20	1.00	1.00	1.00
23	Install Fee - Per DS3	NRC	$333.36	$333.36	1.00	1.00	1.00
25	Install Fee - OC48	NRC	$3,333.60	$3,333.60	1.00	1.00	1.00
26	Install Fee - Per DS3	NRC	$333.36	$333.36	1.00	1.00	1.00
28	Engineering Fee - 90 Mbps	NRC	$1,210.08	$1,210.08	1.00	1.00	1.00
29	Engineering Fee - Per DS3	NRC	$151.26	$151.26	1.00	1.00	1.00
30	Engineering Fee - Per DS1	NRC	$151.26	$151.26	1.00	1.00	1.00
31	Engineering Fee - OC3	NRC	$1,815.12	$1,815.12	1.00	1.00	1.00
32	Engineering Fee - Per DS3	NRC	$151.26	$151.26	1.00	1.00	1.00
33	Engineering Fee - Per DS1	NRC	$151.26	$151.26	1.00	1.00	1.00
34	Engineering Fee - OC12	NRC	$2,420.16	$2,420.16	1.00	1.00	1.00
35	Engineering Fee - Per DS3	NRC	$151.26	$151.26	1.00	1.00	1.00
37	Engineering Fee - OC48	NRC	$3,025.20	$3,025.20	1.00	1.00	1.00
38	Engineering Fee - Per DS3	NRC	$151.26	$151.26	1.00	1.00	1.00

GTOC Washington EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$3.50	$2.57	1.36	1.18	0.87
2	DS3 X-Connect		$31.09	$22.79	1.36	1.14	0.84
3	Power Equipment-Power Material		$418.78	$275.51	1.52	1.14	0.75
4	Power Equipment-DC Power		$5.17	$5.17	1.00	1.00	1.00
5	Power Equipment-Power Cable		$182.06	$119.00	1.53	1.14	0.75
6	Maintenance Fee - Alarm Network		$52.95	$41.46	1.28	1.14	0.89
7	Maintenance Fee - Terminal Equipment		$167.00	$167.00	1.00	1.00	1.00
14	Power Equipment-Power Material	NRC	$4,987.00	$4,987.00	1.00	1.00	1.00
15	Power Equipment-Power Cable	NRC	$2,409.00	$2,409.00	1.00	1.00	1.00
16	Install Fee - 90 Mbps	NRC	$2,731.80	$2,731.80	1.00	1.00	1.00
17	Install Fee - Per DS3	NRC	$364.24	$364.24	1.00	1.00	1.00
18	Install Fee - Per DS1	NRC	$91.06	$91.06	1.00	1.00	1.00
19	Install Fee - OC3	NRC	$2,731.80	$2,731.80	1.00	1.00	1.00
20	Install Fee - Per DS3	NRC	$364.24	$364.24	1.00	1.00	1.00
21	Install Fee - Per DS1	NRC	$91.06	$91.06	1.00	1.00	1.00
22	Install Fee - OC12	NRC	$2,731.80	$2,731.80	1.00	1.00	1.00
23	Install Fee - Per DS3	NRC	$364.24	$364.24	1.00	1.00	1.00
25	Install Fee - OC48	NRC	$3,642.40	$3,642.40	1.00	1.00	1.00
26	Install Fee - Per DS3	NRC	$364.24	$364.24	1.00	1.00	1.00
28	Engineering Fee - 90 Mbps	NRC	$1,346.72	$1,346.72	1.00	1.00	1.00
29	Engineering Fee - Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00
30	Engineering Fee - Per DS1	NRC	$168.34	$168.34	1.00	1.00	1.00
31	Engineering Fee - OC3	NRC	$2,020.08	$2,020.08	1.00	1.00	1.00
32	Engineering Fee - Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00
33	Engineering Fee - Per DS1	NRC	$168.34	$168.34	1.00	1.00	1.00
34	Engineering Fee - OC12	NRC	$2,693.44	$2,693.44	1.00	1.00	1.00
35	Engineering Fee - Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00
37	Engineering Fee - OC48	NRC	$3,366.80	$3,366.80	1.00	1.00	1.00
38	Engineering Fee - Per DS3	NRC	$168.34	$168.34	1.00	1.00	1.00

GTOC Wisconsin EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect		$3.29	$2.40	1.37	1.37	1.00
2	DS3 X–Connect		$30.39	$22.10	1.37	1.36	0.99
3	Power Equipment–Power Material		$413.92	$263.36	1.57	1.36	0.87
4	Power Equipment–DC Power		$5.05	$5.05	1.00	1.00	1.00
5	Power Equipment–Power Cable		$179.43	$113.40	1.58	1.36	0.86
6	Maintenance Fee – Alarm Network		$46.82	$34.21	1.37	1.36	0.99
7	Maintenance Fee – Terminal Equipment		$152.00	$152.00	1.00	1.00	1.00
14	Power Equipment–Power Material	NRC	$4,450.00	$4,450.00	1.00	1.00	1.00
15	Power Equipment–Power Cable	NRC	$2,150.00	$2,150.00	1.00	1.00	1.00
16	Install Fee – 90 Mbps	NRC	$2,480.40	$2,480.40	1.00	1.00	1.00
17	Install Fee – Per DS3	NRC	$330.72	$330.72	1.00	1.00	1.00
18	Install Fee – Per DS1	NRC	$82.68	$82.68	1.00	1.00	1.00
19	Install Fee – OC3	NRC	$2,480.40	$2,480.40	1.00	1.00	1.00
20	Install Fee – Per DS3	NRC	$330.72	$330.72	1.00	1.00	1.00
21	Install Fee – Per DS1	NRC	$82.68	$82.68	1.00	1.00	1.00
22	Install Fee – OC12	NRC	$2,480.40	$2,480.40	1.00	1.00	1.00
23	Install Fee – Per DS3	NRC	$330.72	$330.72	1.00	1.00	1.00
25	Install Fee – OC48	NRC	$3,307.20	$3,307.20	1.00	1.00	1.00
26	Install Fee – Per DS3	NRC	$330.72	$330.72	1.00	1.00	1.00
28	Engineering Fee – 90 Mbps	NRC	$1,069.44	$1,069.44	1.00	1.00	1.00
29	Engineering Fee – Per DS3	NRC	$133.68	$133.68	1.00	1.00	1.00
30	Engineering Fee – Per DS1	NRC	$133.68	$133.68	1.00	1.00	1.00
31	Engineering Fee – OC3	NRC	$1,604.16	$1,604.16	1.00	1.00	1.00
32	Engineering Fee – Per DS3	NRC	$133.68	$133.68	1.00	1.00	1.00
33	Engineering Fee – Per DS1	NRC	$133.68	$133.68	1.00	1.00	1.00
34	Engineering Fee – OC12	NRC	$2,138.88	$2,138.88	1.00	1.00	1.00
35	Engineering Fee – Per DS3	NRC	$133.68	$133.68	1.00	1.00	1.00
37	Engineering Fee – OC48	NRC	$2,673.60	$2,673.60	1.00	1.00	1.00
38	Engineering Fee – Per DS3	NRC	$133.68	$133.68	1.00	1.00	1.00

Southwestern EIS Overhead Analysis

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	Virtual EIS Rate Elements		Proposed Rate (a)	Overhead Rate Adj. Factor (e) = (d/c)
1	Interconnection Cross Connect			
2	DS1, Per Ckt		$4.64	1.00
3	DS3, Per Ckt		$46.33	0.80
4	Switched Transport Connection			
5	Per Transport Connection		$6.04	0.58
6	Entrance Cable			
7	Per Entrance Cable	NRC	$27.86	0.47
8	Per Splice Case	NRC	$8.21	0.47
9	Per Riser Tail	NRC	$127.31	0.47
10	Non–Designated Conversion Arrangment			
11	DS1 to VG/DS0, Elec, per arrangment	NRC	$451.64	0.47
12	DS3 to DS1, Elec, per arrangment	NRC	$815.00	0.51
13				
14	DESIGNATED EQUIPMENT ARRANGEMENTS			
15				
16	AT&T DDM–1000 ASYNCHRONOUS DS3 to DS1 SERVICE			
17				
18	– BASIC ARRANGEMENT (Max 336 DS1s)	NRC	$25.85	0.47
19	– PRIMARY ARRAY (1 PER 56 DS1s)	NRC	$72.40	0.47
20	– SECONDARY ARRAY (1 FOR 28 DS1s)	NRC	$102.17	0.47
21	– TERMINATION CARD (1 PER 4 DS1s)	NRC	$18.80	0.59

Southwestern EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Overhead Rate Adj. Factor (e) = (d/c)
	APPENDIX B-1			
22	AT&T DDM-2000 (OC-3) 1310nm - DS1 & DS3 SERVICE			
23	Sonet Ring Configuration			
24	- BASIC ARRANGEMENT (Max 504 DS1s /18 DS3s)	NRC	$22.23	0.47
25	- PRIMARY ARRAY , PER 84 DS1s / 3 DS3s	NRC	$426.85	0.47
26	- SECONDARY ARRAY (DS1) 1 PER 28 DS1s	NRC	$72.74	0.47
27	- SECONDARY ARRAY (DS3) 1 PER DS3	NRC	$39.28	0.47
28	- TERMINATION CARD (DS1), 1 PER 4 DS1s	NRC	$9.39	0.60
29	- TERMINATION CARD (DS3), 1 PER DS3	NRC	$21.96	0.47
30				
31	Terminal Configuration			
32	- BASIC ARRANGEMENT (Max 504 DS1s /18 DS3s)	NRC	$22.23	0.47
33	- PRIMARY ARRAY , PER 84 DS1s / 3 DS3s	NRC	$393.06	0.47
34	- SECONDARY ARRAY (DS1) 1 PER 28 DS1s	NRC	$72.74	0.47
35	- SECONDARY ARRAY (DS3) 1 PER DS3	NRC	$39.28	0.47
36	- TERMINATION CARD (DS1), 1 PER 4 DS1s	NRC	$9.39	0.60
37	- TERMINATION CARD (DS3), 1 PER DS3	NRC	$21.96	0.47
38				
39	AT&T DDM-2000 (OC-3) 1310nm - DS1 & DS3 SERVICE			
40	Linear Chain Configuration			
41	- BASIC ARRANGEMENT (1 PER 504 DS1s or 18 DS3s)	NRC	$22.23	0.47
42	- PRIMARY ARRAY , 1 PER 84 DS1s or 3 DS3s	NRC	$659.19	0.47
43	- SECONDARY ARRAY (DS1) 1 PER 28 DS1s	NRC	$72.74	0.47
44	- SECONDARY ARRAY (DS3) 1 PER DS3	NRC	$39.28	0.47
45	- TERMINATION CARD (DS1), 1 PER 4 DS1s	NRC	$9.39	0.60
46	- TERMINATION CARD (DS3), 1 PER DS3	NRC	$21.96	0.47
47				
48	AT&T DDM-2000 (OC-12) 1310nm - DS3 & OC3 SERVICE			
49				
50	Sonet Ring Configuration			
51	- BASIC ARRANGEMENT (MAX 48 DS3s OR 16 OC3s)	NRC	$22.30	0.47
52	- PRIMARY ARRAY (1 PER 12 DS3s OR 4 OC3s)	NRC	$677.45	0.47
53	- SECONDARY ARRAY (DS3) 1 PER 3 DS3s	NRC	$103.52	0.47
54	- SECONDARY ARRAY (OC3) 1 PER OC3	NRC	$79.84	0.47
55	- TERMINATION CARD (DS3), 1 PER 3 DS3s	NRC	$72.46	0.47
56	- TERMINATION CARD (OC3), 1 PER OC3	NRC	$60.72	0.47
57				
58	AT&T DDM-2000 (OC-12) 1310nm - DS3 & OC3 SERVICE			
59	Terminal Configuration			
60	- BASIC ARRANGEMENT (Max 48 DS3s, 16 OC3s OR COMB)	NRC	$22.30	0.47
61	- PRIMARY ARRAY (1 PER 12 DS3s, 4 OC3s OR COMB)	NRC	$606.60	0.47
62	- SECONDARY ARRAY (DS3) 1 PER 3 DS3s	NRC	$103.52	0.47
63	- SECONDARY ARRAY (OC3) 1 PER OC3	NRC	$79.84	0.47
64	- TERMINATION CARD (DS3), 1 PER 3 DS3s	NRC	$72.46	0.47
65	- TERMINATION CARD (OC3), 1 PER OC3	NRC	$60.72	0.47

Southwestern EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Overhead Rate Adj. Factor (e) = (d/c)
	APPENDIX B-1			
66	AT&T FT-2000 (OC-48) 1310nm – DS3 & OC3 SERVICE			
67				
68	Sonet Ring Configuration			
69	– BASIC ARRANGEMENT (MAX 48 DS3s OR 8 OC3s)	NRC	$381.46	0.47
70	– PRIMARY ARRAY (1 PER 48 DS3s OR 8 OC3s OR COMB)	NRC	$865.41	0.47
71	– SECONDARY ARRAY (DS3) 1 PER 3 DS3s	NRC	$161.14	0.47
72	– SECONDARY ARRAY (OC3) 1 PER OC3	NRC	$118.20	0.47
73	– TERMINATION CARD (DS3), 1 PER 3 DS3s	NRC	$84.67	0.47
74	– TERMINATION CARD (OC3), 1 PER OC3	NRC	$93.41	0.47
75				
76	FUJITSU FLM-150 (OC-3) 1310nm DS1 & DS3 SERVICE			
77	Sonet Ring Configuration			
78	– BASIC ARRAN. (1 per 504 DS1s, 18 DS3s OR COMB)	NRC	$21.31	0.47
79	– PRIMARY ARRAY (1 per 84 DS1s, 3 DS3s OR COMB)	NRC	$748.77	0.47
80	– SECONDARY ARRAY (DS1) 1 PER 28 DS1s	NRC	$46.73	0.47
81	– SECONDARY ARRAY (DS3) 1 PER DS3	NRC	$30.83	0.47
82	– TERMINATION CARD (DS1) (1 PER 4 DS1s)	NRC	$16.82	0.60
83	– TERMINATION CARD (DS3) (1 PER DS3)	NRC	$22.14	0.47
84				
85	Terminal Configuration			
86	– BASIC ARRANGEMENT (1 per 504 DS1s, 18 DS3s OR COMB)	NRC	$21.31	0.47
87	– PRIMARY ARRAY (1 per 84 DS1s, 3 DS3s OR COMB)	NRC	$600.63	0.47
88	– SECONDARY ARRAY (DS1) 1 PER 28 DS1s	NRC	$46.73	0.47
89	– SECONDARY ARRAY (DS3) 1 PER DS3	NRC	$30.83	0.47
90	– TERMINATION CARD (DS1) (1 PER 4 DS1s)	NRC	$16.82	0.60
91	– TERMINATION CARD (DS3) (1 PER DS3)	NRC	$22.14	0.47
92				
93	FUJITSU FLM-150 (OC-3) 1310nm DS1 & DS3 SERVICE			
94	Linear Chain Configuration			
95	– BASIC ARRANGEMENT (1 per 504 DS1s, 18 DS3s OR COMB)	NRC	$21.31	0.47
96	– PRIMARY ARRAY (1 per 84 DS1s, 3 DS3s OR COMB)	NRC	$595.84	0.47
97	– SECONDARY ARRAY (DS1) 1 PER 28 DS1s	NRC	$46.73	0.47
98	– SECONDARY ARRAY (DS3) 1 PER DS3	NRC	$30.83	0.47
99	– TERMINATION CARD (DS1) (1 PER 4 DS1s)	NRC	$16.82	0.60
100	– TERMINATION CARD (DS3) (1 PER DS3)	NRC	$22.14	0.47
101	FUJITSU FLM-600 (OC-12) 1310nm DS3/OC3 SERVICE			
102	Sonet Ring Configuration			
103	– BASIC ARRANGEMENT (MAX 72 DS3s, 24 OC3s OR COMB)	NRC	$22.84	0.47
104	– PRIMARY DS3 ARRAY (1 PER 12 DS3s, 4 OC3s OR COMB)	NRC	$915.09	0.47
105	– SECONDARY DS3 ARRAY (1 PER 3 DS3s)	NRC	$49.71	0.47
106	– SECONDARY OC3 ARRAY (1 PER 2 OC3s)	NRC	$123.96	0.47
107	– TERTIARY OC3 ARRAY (1 PER OC3)	NRC	$40.62	0.47
108	– TERMINATION CARD (1 PER 3 DS3s)	NRC	$33.63	0.47
109	– TERMINATION CARD (1 PER OC3)	NRC	$40.62	0.47

Southwestern EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Overhead Rate Adj. Factor (e) = (d/c)
	APPENDIX B-1			
110	FUJITSU FLM-600 (OC-12) 1310nm DS3/OC3 SERVICE			
111				
112	Terminal Configuration			
113	- BASIC ARRANGEMENT (MAX 72 DS3s, 24 OC3s OR COMB)	NRC	$22.84	0.47
114	- PRIMARY DS3 ARRAY (1 PER 12 DS3s, 4 OC3s OR COMB)	NRC	$915.09	0.47
115	- SECONDARY DS3 ARRAY (1 PER 3 DS3s)	NRC	$49.71	0.47
116	- SECONDARY OC3 ARRAY (1 PER 2 OC3s)	NRC	$123.96	0.47
117	- TERTIARY OC3 ARRAY (1 PER OC3)	NRC	$40.62	0.47
118	- TERMINATION CARD (1 PER 3 DS3s)	NRC	$33.63	0.47
119	- TERMINATION CARD (1 PER OC3)	NRC	$40.62	0.47
120				
121	Linear Chain Configuration			
122	- BASIC ARRANGEMENT (MAX 72 DS3s, 24 OC3s OR COMB)	NRC	$22.84	0.47
123	- PRIMARY DS3 ARRAY (1 PER 12 DS3s, 4 OC3s OR COMB)	NRC	$1,232.05	0.47
124	- SECONDARY DS3 ARRAY (1 PER 3 DS3s)	NRC	$49.71	0.47
125	- SECONDARY OC3 ARRAY (1 PER 2 OC3s)	NRC	$123.96	0.47
126	- TERTIARY OC3 ARRAY (1 PER OC3)	NRC	$40.62	0.47
127	- TERMINATION CARD (1 PER 3 DS3s)	NRC	$33.63	0.47
128	- TERMINATION CARD (1 PER OC3)	NRC	$40.62	0.47
129				
130	FUJITSU FLM-2400 (OC-48) 1310nm DS3/OC12 SERVICE			
131				
132	Sonet Ring Configuration			
133	- BASIC ARRANGEMENT (1 PER 96 DS3s, 8 OC12s OR COMB)	NRC	$19.47	0.47
134	- PRIMARY DS3 ARRAY (1 PER 48 DS3s, 4 OC12s OR COMB)	NRC	$1,730.41	0.47
135	- SECONDARY ARRAY (1 PER 24 DS3s, 2 OC12s OR COMB)	NRC	$164.01	0.47
136	- TERTIARY DS3 ARRAY (1 PER 12 DS3s)	NRC	$43.82	0.47
137	- TERTIARY OC12 ARRAY (1 PER OC12)	NRC	$316.01	0.47
138	- TERMINATION CARD (1 PER 3 DS3s)	NRC	$28.46	0.47
139	- TERMINATION CARD (1 PER OC12)	NRC	$152.86	0.47
140				
141	Terminal Configuration			
142	- BASIC ARRANGEMENT (1 PER 96 DS3s, 8 OC12s OR COMB)	NRC	$19.47	0.47
143	- PRIMARY DS3 ARRAY (1 PER 48 DS3s, 4 OC12s OR COMB)	NRC	$1,718.33	0.47
144	- SECONDARY ARRAY (1 PER 24 DS3s, 2 OC12s OR COMB)	NRC	$164.01	0.47
145	- TERTIARY DS3 ARRAY (1 PER 12 DS3s)	NRC	$43.82	0.47
146	- TERTIARY OC12 ARRAY (1 PER OC12)	NRC	$316.01	0.47
147	- TERMINATION CARD (1 PER 3 DS3s)	NRC	$28.46	0.47
148	- TERMINATION CARD (1 PER OC12)	NRC	$152.86	0.47
149				
150	FUJITSU FLM-2400 (OC-48) 1310nm DS3/OC12 SERVICE			
151				
152	Linear Chain Configuration			
153	- BASIC ARRANGEMENT (1 PER 96 DS3s, 8 OC12s OR COMB)	NRC	$19.47	0.47
154	- PRIMARY DS3 ARRAY (1 PER 48 DS3s, 4 OC12s OR COMB)	NRC	$1,730.41	0.47
155	- SECONDARY ARRAY (1 PER 24 DS3s, 2 OC12s OR COMB)	NRC	$164.01	0.47
156	- TERTIARY DS3 ARRAY (1 PER 12 DS3s)	NRC	$43.82	0.47
157	- TERTIARY OC12 ARRAY (1 PER OC12)	NRC	$316.01	0.47
158	- TERMINATION CARD (1 PER 3 DS3s)	NRC	$28.46	0.47
159	- TERMINATION CARD (1 PER OC12)	NRC	$152.86	0.47

Southwestern EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Overhead Rate Adj. Factor (e) = (d/c)
	APPENDIX B-1			
160	FUJITSU FLM-2400 (OC-48) 1310nm OC3 SERVICE			
161				
162	Sonet Ring Configuration			
163	- BASIC ARRANGEMENT (1 PER 16 OC3s)	NRC	$19.47	0.47
164	- PRIMARY DS3 ARRAY (1 PER 16 OC3s)	NRC	$1,730.41	0.47
165	- SECONDARY ARRAY (1 PER 4 OC3s)	NRC	$848.25	0.47
166	- TERMINATION CARD (1 PER OC3)	NRC	$40.62	0.47
167				
168	FUJITSU FLM-2400 (OC-48) 1310nm OC3 SERVICE			
169				
170	Terminal Configuration			
171	- BASIC ARRANGEMENT (1 PER 16 OC3s)	NRC	$19.47	0.47
172	- PRIMARY DS3 ARRAY (1 PER 16 OC3s)	NRC	$1,718.33	0.47
173	- SECONDARY ARRAY (1 PER 4 OC3s)	NRC	$848.25	0.47
174	- TERMINATION CARD (1 PER OC3)	NRC	$40.62	0.47
175				
176	Linear Chain Configuration			
177	- BASIC ARRANGEMENT (1 PER 16 OC3s)	NRC	$19.47	0.47
178	- PRIMARY DS3 ARRAY (1 PER 16 OC3s)	NRC	$1,730.41	0.47
179	- SECONDARY ARRAY (1 PER 4 OC3s)	NRC	$848.25	0.47
180	- TERMINATION CARD (1 PER OC3)	NRC	$40.62	0.47

Southwestern EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Overhead Rate Adj. Factor (e) = (d/c)
198	APPENDIX B-1 NORTHERN TELECOM FMT 150C ASYNCH DS3 TO DS1 SERVICE			
199				
200	– BASIC ARRANGEMENT (1 PER XX DS1s)	NRC	$62.30	0.47
201	– PRIMARY DS3 ARRAY (1 PER 56 DS1s)	NRC	$90.47	0.47
202	– SECONDARY ARRAY (1 PER 28 DS1)	NRC	$12.04	0.47
203	– TERMINATION CARD (1 PER 4 DS1)	NRC	$16.72	0.60
204				
205	TEL LABS TITAN 5500S DCC/MULTIPLEXER DS3 TO DS1 SVC			
206	– BASIC ARRANGEMENT (1 PER 3584 DS1s)	NRC	$1,538.64	0.47
207	– PRIMARY ARRAY (1 per 448 DS1s, 64 DS3s OR COMB)	NRC	$55.61	0.47
208	– SECONDARY ARRAY (DS1) (1 FOR 112 DS1s)	NRC	$265.85	0.47
209	– SECONDARY ARRAY (DS3) (1 FOR 16 DS3s)	NRC	$308.74	0.47
210	– TER. ARRAY (DS1/DS3) (1 per 896 DS1s,32 DS3s or COMB)	NRC	$71.05	0.47
211	– TERTIARY ARRAY (DS1) (1 PER 28 DS1s)	NRC	$17.41	0.47
212	– TERTIARY ARRAY (DS3) (1 PER 8 DS3s)	NRC	$43.74	0.47
213	– TERMINATION CARD (DS1) (1 PER 4 DS1s)	NRC	$15.27	0.60
214	– TERMINATION CARD (DS3) (1 PER DS3)	NRC	$38.37	0.47
215				
216	RELIANCE COMM/TEC DISC*S VG SERVICE			
217	– BASIC ARRANGEMENT (672 VG CKTS)	NRC	$637.82	0.74
218	– TERMINATION CARDS (1 PER VG CKTS)	NRC	$1.38	0.74

Southwestern EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Overhead Rate Adj. Factor (e) = (d/c)
	APPENDIX B-1			
219	NORTHERN TELCOM FMT 150D ASYNCH DS3 SVC			
220	– BASIC ARRANCEMENT (1 per 48 DS3s)	NRC	$62.50	0.47
221	– PRIMARY DS3 ARRAY (1 per 6 DS3s)	NRC	$259.82	0.47
222	– SECONDARY ARRAY (1 per DS3)	NRC	$31.31	0.47
223	– TERMINATION CARD (1 PER DS3)	NRC	$28.41	0.47
224				
225	NORTHERN TELCOM S/DMS TRANSPORT NODE OC12 DS3/OC3 SVC			
226	– BASIC ARRANCEMENT (1 per 36 DS3s, 12 OC3s or COMB)	NRC	$58.97	0.47
227	– PRIMARY DS3 ARRAY (1 per 12 DS3s or 4 OC3s or COMB)	NRC	$1,402.72	0.47
228	– SECONDARY ARRAY (DS3) (1 per 12 DS3)	NRC	$167.45	0.47
229	– SECONDARY ARRAY (OC3) (1 per 4 OC3)	NRC	$109.42	0.47
230	– TERMINATION CARD (DS3) (1 PER 3 DS3s)	NRC	$68.99	0.47
231	– TERMINATION CARD (OC3) (1 PER OC3)	NRC	$45.09	0.47
232				
233	NORTHERN TELCOM S/DMS TRANSPORT NODE OC48 DS3/OC12 SVC			
234	– BASIC ARRANCEMENT (1 per 48 DS3s, 4 OC12s or COMB)	NRC	$76.90	0.47
235	– PRIMARY DS3 ARRAY (1 per 48 DS3s or 4 OC12s or COMB)	NRC	$4,028.17	0.47
236	– SECONDARY ARRAY (DS3) (1 per 48 DS3s)	NRC	$78.44	0.47
237	– SECONDARY ARRAY (OC12) (1 per OC12)	NRC	$170.28	0.47
238	– TERTIARY ARRAY (DS3) (1 PER 24 DS3s)	NRC	$20.90	0.47
239	– TERMINATION CARD (DS3) (1 PER 3 DS3s)	NRC	$69.00	0.47
240	– TERMINATION CARD (OC12) (1 PER OC12)	NRC	$149.81	0.47
241				
242	SONEPLEX DS1/DS3 SVC			
243	–BASIC ARRANCEMENT (1 per 112 DS1s or 1 per 84 DS1s and 1 DS3	NRC	264.28	0.47
244	–PRIMARY ARRAY (1 per 28 DS1s and 1 per 1 DS3)	NRC	87.34	0.47
245	–SECONDARY ARRAY (DS1) (1 per 56 DS1s)	NRC	17.32	0.47
246	–SECONDARY ARRAY (DS3) (1 per 1 DS3)	NRC	16.83	0.47
247	–TERMINATION CARD (DS1) (1 per 1 DS1)	NRC	2.9	0.60
248	–TERMINATION CARD (DS3) (1 per 1 DS3)	NRC	33.54	0.47

Southwestern EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Overhead Rate Adj. Factor (e) = (d/c)
	APPENDIX B-2			
249	NON-DESIGNATED CONVERSION ARRANGEMENTS			
250	- DS3 TO DS1 (ELEC), PER ARRANGEMENT	NRC	$202.00	1.00
251	- DS1 TO VG/DS0 (ELEC), PER ARRANGEMENT	NRC	$0.00	1.00
252	DESIGNATED EQUIPMENT ARRANGEMENTS			
253	AT&T DDM-1000 ASYNCHRONOUS DS3 to DS1 SERVICE			
254	- BASIC ARRANGEMENT (Max 336 DS1s)	NRC	$4,200.00	0.47
255	- PRIMARY ARRAY (1 PER 56 DS1s)	NRC	$11,765.00	0.47
256	- SECONDARY ARRAY (1 FOR 28 DS1s)	NRC	$16,602.00	0.47
257	- TERMINATION CARD (1 PER 4 DS1s) - FIRST	NRC	$3,160.00	0.59
258	- TERMINATION CARD (1 PER 4 DS1s) - ADDTL	NRC	$3,132.00	0.59
259	AT&T DDM-2000 (OC-3) 1310nm - DS1 & DS3 SERVICE			
260	Sonet Ring Configuration			
261	- BASIC ARRANGEMENT (Max 504 DS1s /18 DS3s)	NRC	$3,612.00	0.47
262	- PRIMARY ARRAY , PER 84 DS1s / 3 DS3s	NRC	$69,360.00	0.47
263	- SECONDARY ARRAY (DS1) 1 PER 28 DS1s	NRC	$11,820.00	0.47
264	- SECONDARY ARRAY (DS3) 1 PER DS3	NRC	$6,384.00	0.47
265	- TERMINATION CARD (DS1), 1 PER 4 DS1s - FIRST	NRC	$1,631.00	0.47
266	- TERMINATION CARD (DS1), 1 PER 4 DS1s - ADDTL	NRC	$1,603.00	0.47
267	- TERMINATION CARD (DS3), 1 PER DS3 - FIRST	NRC	$3,762.00	0.47
268	- TERMINATION CARD (DS3), 1 PER DS3 - ADDTL	NRC	$3,717.00	0.47
269				
270	AT&T DDM-2000 (OC-3) 1310nm - DS1 & DS3 SERVICE			
271	Terminal Configuration			
272	- BASIC ARRANGEMENT (Max 504 DS1s /18 DS3s)	NRC	$3,612.00	0.47
273	- PRIMARY ARRAY , PER 84 DS1s / 3 DS3s	NRC	$63,868.00	0.47
274	- SECONDARY ARRAY (DS1) 1 PER 28 DS1s	NRC	$11,820.00	0.47
275	- SECONDARY ARRAY (DS3) 1 PER DS3	NRC	$6,384.00	0.47
276	- TERMINATION CARD (DS1), 1 PER 4 DS1s - FIRST	NRC	$1,631.00	0.60
277	- TERMINATION CARD (DS1), 1 PER 4 DS1s - ADDTL	NRC	$1,603.00	0.60
278	- TERMINATION CARD (DS3), 1 PER DS3 - FIRST	NRC	$3,762.00	0.47
279	- TERMINATION CARD (DS3), 1 PER DS3 - ADDTL	NRC	$3,717.00	0.47
280				
281	Linear Chain Configuration			
282	- BASIC ARRANGEMENT (1 PER 504 DS1s or 18 DS3s)	NRC	$3,612.00	0.47
283	- PRIMARY ARRAY , 1 PER 84 DS1s or 3 DS3s	NRC	$107,112.00	0.47
284	- SECONDARY ARRAY (DS1) 1 PER 28 DS1s	NRC	$11,820.00	0.47
285	- SECONDARY ARRAY (DS3) 1 PER DS3	NRC	$6,384.00	0.47
286	- TERMINATION CARD (DS1), 1 PER 4 DS1s - FIRST	NRC	$1,631.00	0.60
287	- TERMINATION CARD (DS1), 1 PER 4 DS1s - ADDTL	NRC	$1,603.00	0.60
288	- TERMINATION CARD (DS3), 1 PER DS3 - FIRST	NRC	$3,762.00	0.47
289	- TERMINATION CARD (DS3), 1 PER DS3 - ADDTL	NRC	$3,717.00	0.47

Southwestern EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Overhead Rate Adj. Factor (e) = (d/c)
	APPENDIX B-2			
290	AT&T DDM-2000 (OC-12) 1310nm - DS3 & OC3 SERVICE			
291	Sonet Ring Configuration			
292	- BASIC ARRANGEMENT (MAX 48 DS3s OR 16 OC3s)	NRC	$3,624.00	0.47
293	- PRIMARY ARRAY (1 PER 12 DS3s OR 4 OC3s)	NRC	$110,079.00	0.47
294	- SECONDARY ARRAY (DS3) 1 PER 3 DS3s	NRC	$16,821.00	0.47
295	- SECONDARY ARRAY (OC3) 1 PER OC3	NRC	$12,973.00	0.47
296	- TERMINATION CARD (DS3), 1 PER 3 DS3s - FIRST	NRC	$11,966.00	0.47
297	- TERMINATION CARD (DS3), 1 PER 3 DS3s - ADDTL	NRC	$11,922.00	0.47
298	- TERMINATION CARD (OC3), 1 PER OC3 - FIRST	NRC	$10,059.00	0.47
299	- TERMINATION CARD (OC3), 1 PER OC3 - ADDTL	NRC	$10,015.00	0.47
300				
301	Terminal Configuration			
302	- BASIC ARRANG. (Max 48 DS3s, 16 OC3s OR COMBINATION)	NRC	$3,624.00	0.47
303	- PRIMARY ARRAY (1 PER 12 DS3s, 4 OC3s OR COMBINATION)	NRC	$98,566.00	0.47
304	- SECONDARY ARRAY (DS3) 1 PER 3 DS3s	NRC	$16,821.00	0.47
305	- SECONDARY ARRAY (OC3) 1 PER OC3	NRC	$12,973.00	0.47
306	- TERMINATION CARD (DS3), 1 PER 3 DS3s - FIRST	NRC	$11,966.00	0.47
307	- TERMINATION CARD (DS3), 1 PER 3 DS3s - ADDTL	NRC	$11,922.00	0.47
308	- TERMINATION CARD (OC3), 1 PER OC3 - FIRST	NRC	$10,059.00	0.47
309	- TERMINATION CARD (OC3), 1 PER OC3 - ADDTL	NRC	$10,015.00	0.47
310				
311	AT&T FT-2000 (OC-48) 1310nm - DS3 & OC3 SERVICE			
312	Sonet Ring Configuration			
313	- BASIC ARRANGEMENT (MAX 48 DS3s OR 8 OC3s)	NRC	$61,983.00	0.47
314	- PRIMARY ARRAY (1 PER 48 DS3s OR 8 OC3s OR COMB)	NRC	$140,619.00	0.47
315	- SECONDARY ARRAY (DS3) 1 PER 3 DS3s	NRC	$26,185.00	0.47
316	- SECONDARY ARRAY (OC3) 1 PER OC3	NRC	$19,206.00	0.47
317	- TERMINATION CARD (DS3), 1 PER 3 DS3s - FIRST	NRC	$13,951.00	0.47
318	- TERMINATION CARD (DS3), 1 PER 3 DS3s - ADDTL	NRC	$13,906.00	0.47
319	- TERMINATION CARD (OC3), 1 PER OC3 - FIRST	NRC	$15,372.00	0.47
320	- TERMINATION CARD (OC3), 1 PER OC3 - ADDTL	NRC	$15,327.00	0.47
321	FUJITSU FLM-150 (OC-3) 1310nm DS1 & DS3 SERVICE			
322	Sonet Ring Configuration			
323	- BASIC ARRANG. (1 PER 504 DS1s OR 18 DS3s OR COMB)	NRC	$3,462.00	0.47
324	- PRIMARY ARRAY (1 PER 84 DS1s OR 3 DS3s OR COMB)	NRC	$121,668.00	0.47
325	- SECONDARY ARRAY (DS1) 1 PER 28 DS1s	NRC	$7,594.00	0.47
326	- SECONDARY ARRAY (DS3) 1 PER DS3	NRC	$5,009.00	0.47
327	- TERMINATION CARD (DS1), 1 PER 4 DS1s - FIRST	NRC	$2,926.00	0.60
328	- TERMINATION CARD (DS1), 1 PER 4 DS1s - ADDTL	NRC	$2,881.00	0.60
329	- TERMINATION CARD (DS3), 1 PER DS3 - FIRST	NRC	$3,791.00	0.47
330	- TERMINATION CARD (DS3), 1 PER DS3 - ADDTL	NRC	$3,746.00	0.47

Southwestern EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Overhead Rate Adj. Factor (e) = (d/c)
	APPENDIX B–2			
331	FUJITSU FLM–150 (OC–3) 1310nm DS1 & DS3 SERVICE			
332	Terminal Configuration			
333	– BASIC ARRANG. (1 PER 504 DS1s OR 18 DS3s OR COMB)	NRC	$3,462.00	0.47
334	– PRIMARY ARRAY (1 PER 84 DS1s OR 3 DS3s OR COMB)	NRC	$97,596.00	0.47
335	– SECONDARY ARRAY (DS1) 1 PER 28 DS1s	NRC	$7,594.00	0.47
336	– SECONDARY ARRAY (DS3) 1 PER DS3	NRC	$5,009.00	0.47
337	– TERMINATION CARD (DS1), 1 PER 4 DS1s – FIRST	NRC	$2,926.00	0.60
338	– TERMINATION CARD (DS1), 1 PER 4 DS1s – ADDTL	NRC	$2,881.00	0.60
339	– TERMINATION CARD (DS3), 1 PER DS3 – FIRST	NRC	$3,791.00	0.47
340	– TERMINATION CARD (DS3), 1 PER DS3 – ADDTL	NRC	$3,746.00	0.47
341				
342	Linear Chain Configuration			
343	– BASIC ARRANG. (1 PER 504 DS1s OR 18 DS3s OR COMB)	NRC	$3,462.00	0.47
344	– PRIMARY ARRAY (1 PER 84 DS1s OR 3 DS3s OR COMB)	NRC	$96,817.00	0.47
345	– SECONDARY ARRAY (DS1) 1 PER 28 DS1s	NRC	$7,594.00	0.47
346	– SECONDARY ARRAY (DS3) 1 PER DS3	NRC	$5,009.00	0.47
347	– TERMINATION CARD (DS1), 1 PER 4 DS1s – FIRST	NRC	$2,926.00	0.60
348	– TERMINATION CARD (DS1), 1 PER 4 DS1s – ADDTL	NRC	$2,881.00	0.60
349	– TERMINATION CARD (DS3), 1 PER DS3 – FIRST	NRC	$3,791.00	0.47
350	– TERMINATION CARD (DS3), 1 PER DS3 – ADDTL	NRC	$3,746.00	0.47
351				
352	FUJITSU FLM–600 (OC–12) 1310nm DS3/OC3 SERVICE			
353	Sonet Ring Configuration			
354	– BASIC ARRANG. (MAX 72 DS3s, 24 OC3s OR COMB)	NRC	$3,712.00	0.47
355	– PRIMARY DS3 ARRAY (1 PER 12 DS3s, 4 OC3s OR COMB)	NRC	$148,693.00	0.47
356	– SECONDARY DS3 ARRAY (1 PER 3 DS3s)	NRC	$8,077.00	0.47
357	– SECONDARY OC3 ARRAY (1 PER 2 OC3s)	NRC	$20,142.00	0.47
358	– TERTIARY OC3 ARRAY (1 PER OC3)	NRC	$6,601.00	0.47
359	– TERMINATION CARD (DS3), 1 PER 3 DS3s – FIRST	NRC	$5,657.00	0.47
360	– TERMINATION CARD (DS3), 1 PER 3 DS3s – ADDTL	NRC	$5,613.00	0.47
361	– TERMINATION CARD (OC3), 1 PER OC3 – FIRST	NRC	$6,794.00	0.47
362	– TERMINATION CARD (OC3), 1 PER OC3 – ADDTL	NRC	$6,750.00	0.47
363				
364	Terminal Configuration			
365	– BASIC ARRANG. (MAX 72 DS3s, 24 OC3s OR COMB)	NRC	$3,712.00	0.47
366	– PRIMARY DS3 ARRAY (1 PER 12 DS3s, 4 OC3s OR COMB)	NRC	$148,693.00	0.47
367	– SECONDARY DS3 ARRAY (1 PER 3 DS3s)	NRC	$8,077.00	0.47
368	– SECONDARY OC3 ARRAY (1 PER 2 OC3s)	NRC	$20,142.00	0.47
369	– TERTIARY OC3 ARRAY (1 PER OC3)	NRC	$6,601.00	0.47
370	– TERMINATION CARD (DS3), 1 PER 3 DS3s – FIRST	NRC	$5,657.00	0.47
371	– TERMINATION CARD (DS3), 1 PER 3 DS3s – ADDTL	NRC	$5,613.00	0.47
372	– TERMINATION CARD (OC3), 1 PER OC3 – FIRST	NRC	$6,794.00	0.47
373	– TERMINATION CARD (OC3), 1 PER OC3 – ADDTL	NRC	$6,750.00	0.47

Southwestern EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Overhead Rate Adj. Factor (e) = (d/c)
	APPENDIX B-2			
374	FUJITSU FLM-600 (OC-12) 1310nm DS3/OC3 SERVICE			
375	Linear Chain Configuration			
376	- BASIC ARRANG. (MAX 72 DS3s, 24 OC3s OR COMB)	NRC	$3,712.00	0.47
377	- PRIMARY DS3 ARRAY (1 PER 12 DS3s, 4 OC3s OR COMB)	NRC	$200,196.00	0.47
378	- SECONDARY DS3 ARRAY (1 PER 3 DS3s)	NRC	$8,077.00	0.47
379	- SECONDARY OC3 ARRAY (1 PER 2 OC3s)	NRC	$20,142.00	0.47
380	- TERTIARY OC3 ARRAY (1 PER OC3)	NRC	$6,601.00	0.47
381	- TERMINATION CARD (DS3), 1 PER 3 DS3s - FIRST	NRC	$5,657.00	0.47
382	- TERMINATION CARD (DS3), 1 PER 3 DS3s - ADDTL	NRC	$5,613.00	0.47
383	- TERMINATION CARD (OC3), 1 PER OC3 - FIRST	NRC	$6,794.00	0.47
384	- TERMINATION CARD (OC3), 1 PER OC3 - ADDTL	NRC	$6,750.00	0.47
385	FUJITSU FLM-2400 (OC-48) 1310nm DS3/OC12 SERVICE			
386	Sonet Ring Configuration			
387	- BASIC ARRANG. (1 PER 96 DS3s OR 8 OC12s OR COMB)	NRC	$3,164.00	0.47
388	- PRIMARY DS3 ARRAY (1 PER 48 DS3s OR 4 OC12s OR COMB)	NRC	$281,174.00	0.47
389	- SECONDARY ARRAY (1 PER 24 DS3s OR 2 OC12s OR COMB)	NRC	$26,650.00	0.47
390	- TERTIARY DS3 ARRAY (1 PER 12 DS3s)	NRC	$7,121.00	0.47
391	- TERTIARY OC12 ARRAY (1 PER OC12)	NRC	$51,348.00	0.47
392	- TERMINATION CARD (DS3), 1 PER 3 DS3s - FIRST	NRC	$4,818.00	0.47
393	- TERMINATION CARD (DS3), 1 PER 3 DS3s - ADDTL	NRC	$4,773.00	0.47
394	- TERMINATION CARD (OC12), 1 PER OC12 - FIRST	NRC	$25,031.00	0.47
395	- TERMINATION CARD (OC12), 1 PER OC12 - ADDTL	NRC	$24,986.00	0.47
396				
397	FUJITSU FLM-2400 (OC-48) 1310nm DS3/OC12 SERVICE			
398	Terminal Configuration			
399	- BASIC ARRANG. (1 PER 96 DS3s OR 8 OC12s OR COMB)	NRC	$3,164.00	0.47
400	- PRIMARY DS3 ARRAY (1 PER 48 DS3s OR 4 OC12s OR COMB)	NRC	$279,210.00	0.47
401	- SECONDARY ARRAY (1 PER 24 DS3s OR 2 OC12s OR COMB)	NRC	$26,650.00	0.47
402	- TERTIARY DS3 ARRAY (1 PER 12 DS3s)	NRC	$7,121.00	0.47
403	- TERTIARY OC12 ARRAY (1 PER OC12)	NRC	$51,348.00	0.47
404	- TERMINATION CARD (DS3), 1 PER 3 DS3s - FIRST	NRC	$4,818.00	0.47
405	- TERMINATION CARD (DS3), 1 PER 3 DS3s - ADDTL	NRC	$4,773.00	0.47
406	- TERMINATION CARD (OC12), 1 PER OC12 - FIRST	NRC	$25,031.00	0.47
407	- TERMINATION CARD (OC12), 1 PER OC12 - ADDTL	NRC	$24,986.00	0.47
408				
409	Linear Chain Configuration			
410	- BASIC ARRANG. (1 PER 96 DS3s OR 8 OC12s OR COMB)	NRC	$3,164.00	0.47
411	- PRIMARY DS3 ARRAY (1 PER 48 DS3s OR 4 OC12s OR COMB)	NRC	$281,174.00	0.47
412	- SECONDARY ARRAY (1 PER 24 DS3s OR 2 OC12s OR COMB)	NRC	$26,650.00	0.47
413	- TERTIARY DS3 ARRAY (1 PER 12 DS3s)	NRC	$7,121.00	0.47
414	- TERTIARY OC12 ARRAY (1 PER OC12)	NRC	$51,348.00	0.47
415	- TERMINATION CARD (DS3), 1 PER 3 DS3s - FIRST	NRC	$4,818.00	0.47
416	- TERMINATION CARD (DS3), 1 PER 3 DS3s - ADDTL	NRC	$4,773.00	0.47
417	- TERMINATION CARD (OC12), 1 PER OC12 - FIRST	NRC	$25,031.00	0.47
418	- TERMINATION CARD (OC12), 1 PER OC12 - ADDTL	NRC	$24,986.00	0.47

Southwestern EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Overhead Rate Adj. Factor (e) = (d/c)
	APPENDIX B-2			
419	FUJITSU FLM-2400 (OC-48) 1310nm OC3 SERVICE			
420	Sonet Ring Configuration			
421	- BASIC ARRANGEMENT (1 PER 16 OC3s)	NRC	$3,164.00	0.47
422	- PRIMARY OC3 ARRAY (1 PER 16 OC3s)	NRC	$281,174.00	0.47
423	- SECONDARY ARRAY (1 PER 4 OC3s)	NRC	$137,832.00	0.47
424	- TERMINATION CARD (1 PER OC3) - FIRST	NRC	$6,794.00	0.47
425	- TERMINATION CARD (1 PER OC3) - ADDTL	NRC	$6,750.00	0.47
426	Terminal Configuration			
427	- BASIC ARRANGEMENT (1 PER 16 OC3s)	NRC	$3,164.00	0.47
428	- PRIMARY OC3 ARRAY (1 PER 16 OC3s)	NRC	$279,210.00	0.47
429	- SECONDARY ARRAY (1 PER 4 OC3s)	NRC	$137,832.00	0.47
430	- TERMINATION CARD (1 PER OC3) - FIRST	NRC	$6,794.00	0.47
431	- TERMINATION CARD (1 PER OC3) - ADDTL	NRC	$6,750.00	0.47
432	Linear Chain Configuration			
433	- BASIC ARRANGEMENT (1 PER 16 OC3s)	NRC	$3,164.00	0.47
434	- PRIMARY OC3 ARRAY (1 PER 16 OC3s)	NRC	$281,174.00	0.47
435	- SECONDARY ARRAY (1 PER 4 OC3s)	NRC	$137,832.00	0.47
436	- TERMINATION CARD (1 PER OC3) - FIRST	NRC	$6,794.00	0.47
437	- TERMINATION CARD (1 PER OC3) - ADDTL	NRC	$6,750.00	0.47
438				
439	NORTHERN TELECOM FMT 150C ASYN DS3 TO DS1 SERVICE			
440	- BASIC ARRANGEMENT (1 PER 448 DS1s)	NRC	$10,111.00	0.47
441	- PRIMARY ARRAY (1 PER 56 DS1s)	NRC	$14,683.00	0.47
442	- SECONDARY ARRAY (1 FOR 28 DS1s)	NRC	$1,955.00	0.47
443	- TERMINATION CARD (1 PER 4 DS1s) - FIRST	NRC	$2,819.00	0.60
444	- TERMINATION CARD (1 PER 4 DS1s) - ADDTL	NRC	$2,791.00	0.60
445				
446	TEL LABS TITAN 5500S DCC/MULTIPLEXER DS3 TO DS1 SERVICE			
447	- BASIC ARRANGEMENT (1 PER 3584 DS1s)	NRC	$249,687.00	0.47
448	- PRIMARY ARRAY (1 PER 448 DS1s OR 64 DS3s OR COMB)	NRC	$9,037.00	0.47
449	- SECONDARY ARRAY (DS1) (1 FOR 112 DS1s)	NRC	$43,198.00	0.47
450	- SECONDARY ARRAY (DS3) (1 FOR 16 DS3s)	NRC	$50,167.00	0.47
451	- TER. ARRAY (DS1/DS3) (1 PER 896 DS1s, 32 DS3s OR COMB)	NRC	$11,545.00	0.47
452	- TERTIARY ARRAY (DS1) (1 PER 28 DS1s)	NRC	$2,829.00	0.47
453	- TERTIARY ARRAY (DS3) (1 PER 8 DS3s)	NRC	$7,107.00	0.47
454	- TERMINATION CARD (DS1) (1 PER 4 DS1s) - FIRST	NRC	$2,586.00	0.60
455	- TERMINATION CARD (DS1) (1 PER 4 DS1s) - ADDTL	NRC	$2,558.00	0.60
456	- TERMINATION CARD (DS3) (1 PER DS3) - FIRST	NRC	$6,427.00	0.47
457	- TERMINATION CARD (DS3) (1 PER DS3) - ADDTL	NRC	$6,383.00	0.47
458	RELIANCE COMM/TEC DISC*S VG SERVICE			
459	- BASIC ARRANGEMENT (672 VG CKTS)	NRC	$103,640.00	0.74
460	- TERMINATION CARDS (1 PER VG CKTS) - FIRST	NRC	$330.00	0.74
461	- TERMINATION CARDS (1 PER VG CKTS) - ADDTL	NRC	$302.00	0.74

Southwestern EIS Overhead Analysis

	Virtual EIS Rate Elements	Proposed Rate (a)	Overhead Rate Adj. Factor (e) = (d/c)
	APPENDIX B-2		
462	ENTRANCE CABLE		
463	-PER ENTRANCE CABLE (splice case M/L)	$657.00	0.47
464	-PER SPLICE CASE (expense only, MH to vault)	$1,335.00	0.47
465	-PER RISER TAIL (FDF CONN)	$20,687.00	0.47
466	ENGINEERING DESIGN CHARGE		
467	-PER EQUIPMENT ORDER	$398.00	1.00
468	ADDITIONAL LABOR CHARGE		
469	-ENGINEER, PER FIRST 1/2 HOUR	$29.62	1.00
470	-ENGINEER, PER ADDTL 1/2 HOUR	$29.62	1.00
471	-TECHNICIAN, PER FIRST 1/2 HOUR	$19.87	1.00
472	-TECHNICIAN, PER ADDTL 1/2 HOUR	$19.87	1.00
473			
474	NORTHERN TELECOM FMT 150D ASYNCH DS3 SVC		
475			
476	-BASIC ARRANCEMENT (1 per 48 DS3s)	$10,157.00	0.47
477	-PRIMARY DS3 ARRAY (1 per 6 DS3s)	$42,219.00	0.47
478	-SECONDARY ARRAY (1 per DS3)	$5,089.00	0.47
479	-TERMINATION CARD (1 per DS3) - FIRST	$4,810.00	0.47
480	-TERMINATION CARD (1 per DS3) - ADDTL	$4,765.00	0.47
481			
482	NORTHERN TELECOM S/DMS TRANSPORT NODE OC12 DS3/OC3 SVC		
483			
484	-BASIC ARRANCEMENT (1 per 36 DS3s, 12 OC3s or COMB)	$9,582.00	0.47
485	-PRIMARY DS3 ARRAY (1 per 12 DS3s or 4 OC3s or COMB)	$227,927.00	0.47
486	-SECONDARY ARRAY (DS3) (1 per 12 DS3s)	$27,210.00	0.47
487	-SECONDARY ARRAY (OC3) (1 per 4 OC3s)	$17,780.00	0.47
488	-TERMINATION CARD (DS3) (1 per 3 DS3s) - FIRST	$11,403.00	0.47
489	-TERMINATION CARD (DS3) (1 per 3 DS3s) - ADDTL	$11,359.00	0.47
490	-TERMINATION CARD (OC3) (1 per OC3) - FIRST	$7,520.00	0.47
491	-TERMINATION CARD (OC3) (1 per OC3) - ADDTL	$7,475.00	0.47
492			
493	NORTHERN TELECOM S/DMS TRANSPORT NODE OC48 DS3/OC12 SVC		
494			
495	-BASIC ARRANCEMENT (1 per 48 DS3s, 4 OC12s or COMB)	$12,496.00	0.47
496	-PRIMARY ARRAY (1 per 48 DS3s or 4 OC12s or COMB)	$654,535.00	0.47
497	-SECONDARY ARRAY (DS3) (1 per 48 DS3s)	$12,746.00	0.47
498	-SECONDARY ARRAY (OC12) (1 per OC12)	$27,669.00	0.47
499	-TERTIARY ARRY (DS3) (1 per 24 DS3s)	$3,396.00	0.47
500	-TERMINATION CARD (DS3) (1 per 3 DS3s) - FIRST	$11,405.00	0.47
501	-TERMINATION CARD (DS3) (1 per 3 DS3s) - ADDTL	$11,360.00	0.47
502	-TERMINATION CARD (OC12) (1 per OC12) - FIRST	$24,535.00	0.47
503	-TERMINATION CARD (OC12) (1 per OC12) - ADDTL	$24,490.00	0.47

Southwestern EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Overhead Rate Adj. Factor (e) = (d/c)
504	APPENDIX B–2 SONEPLEX DS1/DS3 SVC			
505				
506	–BASIC ARRANCEMENT (1 per 112 DS1s or 84 DS1s and 1 DS3)	NRC	$43,032.00	0.47
507	–PRIMARY ARRAY (1 per 28 DS1s and 1 per 1 DS3)	NRC	$14,222.00	0.47
508	–SECONDARY ARRAY (DS1) (1 per 56 DS1s)	NRC	$2,821.00	0.47
509	–SECONDARY ARRAY (DS3) (1 per 1 DS3)	NRC	$2,741.00	0.47
510	–TERMINATION CARD (DS1) (1 per 1 DS1) – FIRST	NRC	$665.00	0.60
511	–TERMINATION CARD (DS1) (1 per 1 DS1) – ADDTL	NRC	$620.00	0.60
512	–TERMINATION CARD (DS3) (1 per 1 DS3) – FIRST	NRC	$5,654.00	0.47
513	–TERMINATION CARD (DS3) (1 per 1 DS3) – ADDTL	NRC	$5,609.00	0.47

Sprint / United FL EIS Overhead Analysis

	Virtual EIS Rate Elements	Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect	$4.10	$3.08	1.33	1.33	1.00
2	DS3 X–Connect	$47.60	$39.13	1.22	1.22	1.00
3	Internal Cabling	$0.20	$0.14	1.43	1.23	0.86
4	Internal Conduit	$0.55	$0.39	1.41	1.23	0.87
5	External Cabling and Conduit	$516.40	$352.54	1.46	1.23	0.84
6	Application Fee NRC	$2,520.00	$2,520.96	1.00	1.00	1.00

Sprint / United IN EIS Overhead Analysis

	Virtual EIS Rate Elements	Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect	$4.70	$3.42	1.37	1.37	1.00
2	DS3 X–Connect	$56.80	$45.83	1.24	1.18	0.95
3	Internal Cabling	$0.22	$0.15	1.47	1.18	0.80
4	Internal Conduit	$0.61	$0.41	1.49	1.18	0.79
5	External Cabling and Conduit	$391.40	$250.71	1.56	1.18	0.76
6	Application Fee NRC	$2,598.00	$2,598.72	1.00	1.00	1.00

Sprint / United MO EIS Overhead Analysis

	Virtual EIS Rate Elements	Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect	$5.00	$3.81	1.31	1.31	1.00
2	DS3 X-Connect	$69.10	$58.67	1.18	1.15	0.98
3	Internal Cabling	$0.20	$0.14	1.43	1.15	0.81
4	Internal Conduit	$0.56	$0.37	1.51	1.15	0.76
5	External Cabling and Conduit	$401.30	$259.03	1.55	1.15	0.74
6	Application Fee NRC	$2,609.00	$2,609.60	1.00	1.00	1.00

Sprint / Carolina NC EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$4.10	$3.02	1.36	1.36	1.00
2	DS3 X-Connect		$47.00	$37.99	1.24	1.24	1.00
3	Internal Cabling		$0.20	$0.14	1.43	1.28	0.90
4	Internal Conduit		$0.54	$0.37	1.46	1.28	0.88
5	External Cabling and Conduit		$221.40	$148.21	1.49	1.28	0.86
6	Application Fee	NRC	$2,856.00	$2,856.16	1.00	1.00	1.00

Sprint / United OH EIS Overhead Analysis

	Virtual EIS Rate Elements	Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect	$4.50	$3.31	1.36	1.36	1.00
2	DS3 X–Connect	$54.10	$44.09	1.23	1.23	1.00
3	Internal Cabling	$0.21	$0.14	1.50	1.24	0.83
4	Internal Conduit	$0.56	$0.38	1.47	1.24	0.84
5	External Cabling and Conduit	$492.30	$322.09	1.53	1.24	0.81
6	Application Fee NRC	$2,746.00	$2,746.48	1.00	1.00	1.00

Sprint / United PA EIS Overhead Analysis

	Virtual EIS Rate Elements	Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect	$4.40	$3.55	1.24	1.24	1.00
2	DS3 X-Connect	$57.70	$49.91	1.16	1.12	0.97
3	Internal Cabling	$0.20	$0.14	1.43	1.12	0.78
4	Internal Conduit	$0.55	$0.40	1.38	1.12	0.81
5	External Cabling and Conduit	$265.80	$189.80	1.40	1.12	0.80
6	Application Fee NRC	$2,457.00	$2,457.76	1.00	1.00	1.00

Sprint / United TN, VA EIS Overhead Analysis

	Virtual EIS Rate Elements	Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect	$4.00	$2.91	1.37	1.37	1.00
2	DS3 X-Connect	$46.70	$37.07	1.26	1.26	1.00
3	Internal Cabling	$0.20	$0.13	1.54	1.34	0.87
4	Internal Conduit	$0.54	$0.36	1.50	1.34	0.89
5	External Cabling and Conduit	$240.10	$154.78	1.55	1.34	0.86
6	Application Fee NRC	$2,676.00	$2,676.96	1.00	1.00	1.00

Sprint / Central FL EIS Overhead Analysis

	Virtual EIS Rate Elements	Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect	$4.80	$3.48	1.38	1.38	1.00
2	DS3 X-Connect	$59.50	$47.85	1.24	1.24	1.00
3	Internal Cabling	$0.23	$0.15	1.53	1.42	0.93
4	Internal Conduit	$0.63	$0.41	1.54	1.42	0.92
5	External Cabling and Conduit	$597.10	$372.87	1.60	1.42	0.89
6	Application Fee NRC	$2,520.00	$2,520.96	1.00	1.00	1.00

Sprint / Central IL EIS Overhead Analysis

	Virtual EIS Rate Elements	Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X–Connect	$6.00	$4.24	1.42	1.42	1.00
2	DS3 X–Connect	$78.30	$63.15	1.24	1.24	1.00
3	Internal Cabling	$0.26	$0.16	1.63	1.58	0.97
4	Internal Conduit	$0.72	$0.44	1.64	1.58	0.97
5	External Cabling and Conduit	$358.50	$212.39	1.69	1.58	0.94
6	DSO ECC	$1.70	$1.07	1.59	1.58	1.00
7	Application Fee NRC	$2,704.00	$2,704.16	1.00	1.00	1.00

Sprint / Central NV EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 X-Connect		$4.40	$3.26	1.35	1.35	1.00
2	DS3 X-Connect		$56.20	$46.83	1.20	1.10	0.92
3	Internal Cabling		$0.19	$0.13	1.46	1.10	0.75
4	Internal Conduit		$0.51	$0.34	1.50	1.10	0.73
5	External Cabling and Conduit		$224.50	$145.96	1.54	1.10	0.72
6	Application Fee	NRC	$2,800.00	$2,800.00	1.00	1.00	1.00

U S West EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
1	DS1 Entrance Facility		$21.00	$12.28	1.71	1.40	0.82
2	DS3 Entrance Facility		$75.00	$43.49	1.72	1.20	0.70
3	DS1 Switched Transport Entrance Facility		$21.00	$12.28	1.71	1.40	0.82
4	DS3 Switched Transport Entrance Facility		$75.00	$43.49	1.72	1.20	0.70
5	EIC Entrance Facility – 2 Fibers		$2.85	$1.65	1.73	1.20	0.69
6	Quotation Preparation Fee	NRC	$2,106.00	$1,404.13	1.50	1.20	0.80
7	DS1 Entrance Facility	NRC	$313.25	$266.31	1.18	1.18	1.00
8	DS3 Entrance Facility	NRC	$470.00	$273.16	1.72	1.20	0.70
9	DS1 Switched Trans. Entrance Fac.	NRC	$313.25	$266.31	1.18	1.18	1.00
10	DS3 Switched Trans. Entrance Fac.	NRC	$470.00	$273.16	1.72	1.20	0.70
11	EIC Entrance Facility – 2 Fibers	NRC	$2,064.00	$1,199.98	1.72	1.20	0.70
12	Equip Maint. (Normal Hours)	NRC	$29.25	$17.00	1.72	1.20	0.70
13	Equip Maint. (Non–Normal Hours)	NRC	$44.75	$26.00	1.72	1.20	0.70
14	Inspector (Normal Hours)	NRC	$22.00	$20.00	1.10	1.10	1.00
15	Inspector (Non–Normal Hours)	NRC	$43.00	$31.00	1.39	1.20	0.87
16	Fiber Cable Splicing, Per Set Up	NRC	$654.00	$380.00	1.72	1.20	0.70
17	Fiber Cable Splicing, Fiber Sliced	NRC	$27.50	$16.00	1.72	1.20	0.70
18	Training, Per 1/2 Hour	NRC	$34.25	$19.92	1.72	1.20	0.70

U S West EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
19	AT&T EQUIPMENT						
20	DSX-1 MODEL	NRC	$42,235.32	$32,488.71	1.30	1.20	0.92
21	DSX-3/4 MODEL	NRC	$347,225.07	$267,096.21	1.30	1.20	0.92
22	FT-2000 ADD/DROP MUX (OC3)						
23	Common Equipment	NRC	$881,890.71	$678,377.47	1.30	1.20	0.92
24	OC3 Optical Low Speed Card	NRC	$21,899.20	$16,845.54	1.30	1.20	0.92
25	Add'l Spares - Common	NRC	$201,505.81	$155,004.47	1.30	1.20	0.92
26	FT-2000 ADD/DROP MUX (48STS-1s)						
27	Common Equipment	NRC	$863,243.21	$664,033.24	1.30	1.20	0.92
28	STS-1 LS Interface Card	NRC	$20,240.17	$15,569.36	1.30	1.20	0.92
29	Add'l Spares - Common	NRC	$201,505.81	$155,004.47	1.30	1.20	0.92
30	FT-2000 A/D MUX (DS3/STS-1/OC3)						
31	Common Equipment	NRC	$903,391.75	$694,916.73	1.30	1.20	0.92
32	DS3 Interface Card	NRC	$19,908.37	$15,314.13	1.30	1.20	0.92
33	STS-1 LS Interface Card	NRC	$20,240.17	$15,569.36	1.30	1.20	0.92
34	OC3 Optical Card	NRC	$21,899.20	$16,845.54	1.30	1.20	0.92
35	Add'l Spares - Common	NRC	$201,505.81	$155,004.47	1.30	1.20	0.92
36	FT-2000 ADD/DROP MUX (48 DS3s)						
37	Common Equipment	NRC	$881,890.71	$678,377.47	1.30	1.20	0.92
38	DS3 Interface Card	NRC	$19,908.37	$15,314.13	1.30	1.20	0.92
39	Add'l Spares - Common	NRC	$201,505.81	$155,004.47	1.30	1.20	0.92
40	DACS IV-2000						
41	Common Equipment	NRC	$3,227,872.32	$2,482,978.71	1.30	1.20	0.92
42	DS1 Interface Circuit Pack	NRC	$25,084.54	$19,295.80	1.30	1.30	1.00
43	DS3 Interface Circuit Pack	NRC	$10,750.52	$8,269.63	1.30	1.20	0.92
44	STS-1 Interface Circuit Pack	NRC	$14,931.27	$11,485.59	1.30	1.30	1.00
45	Add'l Spares - Common	NRC	$281,716.60	$216,705.08	1.30	1.20	0.92
46	DACS II-160 DS1s						
47	Common Equipment	NRC	$870,031.97	$669,255.36	1.30	1.20	0.92
48	DS1 Interface Circuit Pack	NRC	$4,598.83	$3,537.56	1.30	1.30	1.00
49	Add'l Spares - Common	NRC	$173,252.53	$133,271.18	1.30	1.20	0.92
50	DDM-1000 DUAL MUX DS3 ELEC						
51	Common Equipment	NRC	$175,691.31	$135,147.16	1.30	1.20	0.92
52	DS1 Interface Card	NRC	$3,683.04	$2,833.11	1.30	1.30	1.00
53	Add'l Spares - Common	NRC	$56,639.30	$43,568.69	1.30	1.20	0.92
54	DDM-1000 DUAL MUX DS3 OP						
55	Common Equipment	NRC	$233,226.47	$179,404.98	1.30	1.20	0.92
56	DS1 Interface Card	NRC	$3,683.04	$2,833.11	1.30	1.30	1.00
57	Add'l Spares - Common	NRC	$56,639.30	$43,568.69	1.30	1.20	0.92

U S West EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
58	ALCATEL EQUIPMENT						
59	1603SM LIGHTWAVE TERMINAL						
60	Common Equipment	NRC	$124,029.10	$95,407.00	1.30	1.20	0.92
61	DS3 Low Speed Interface	NRC	$7,565.18	$5,819.37	1.30	1.20	0.92
62	Add'l Spares – Common	NRC	$39,471.65	$30,362.81	1.30	1.20	0.92
63	1612SM LIGHTWAVE TERMINAL						
64	Common Equipment	NRC	$175,326.32	$134,866.40	1.30	1.20	0.92
65	DS3 Low Speed Interface	NRC	$4,578.93	$3,522.25	1.30	1.20	0.92
66	Add'l Spares – Common	NRC	$55,282.20	$42,524.77	1.30	1.20	0.92
67	1624SM LIGHTWAVE TERMINAL						
68	Common Equipment	NRC	$290,877.77	$223,752.13	1.30	1.20	0.92
69	DS3 Low Speed Interface	NRC	$11,945.02	$9,188.48	1.30	1.20	0.92
70	Add'l Spares – Common	NRC	$89,753.53	$69,041.18	1.30	1.20	0.92
71	1648SM LIGHTWAVE TERMINAL						
72	Common Equipment	NRC	$475,743.52	$365,956.55	1.30	1.20	0.92
73	DS3 Low Speed Interface	NRC	$12,677.76	$9,752.12	1.30	1.20	0.92
74	Add'l Spares – Common	NRC	$166,234.84	$127,872.95	1.30	1.20	0.92
75	TM–50						
76	Common Equipment	NRC	$70,900.32	$54,538.71	1.30	1.20	0.92
77	DS1 Interface	NRC	$447.94	$344.57	1.30	1.30	1.00
78	Add'l Spares – Common	NRC	$24,055.94	$18,504.57	1.30	1.20	0.92
79	ADM–50						
80	Common Equipment	NRC	$126,043.16	$96,956.28	1.30	1.20	0.92
81	DS1 Interface	NRC	$447.94	$344.57	1.30	1.30	1.00
82	Add'l Spares – Common	NRC	$33,884.03	$26,064.64	1.30	1.20	0.92
83	DMX–3003						
84	Common Equipment	NRC	$871,024.06	$670,018.51	1.30	1.20	0.92
85	M13	NRC	$34,142.85	$26,263.73	1.30	1.20	0.92
86	Add'l Spares – Common	NRC	$17,685.27	$13,604.05	1.30	1.20	0.92
87	LTS–1565 LIGHTWAVE TERMINAL						
88	Common Equipment	NRC	$339,072.60	$260,825.08	1.30	1.20	0.92
89	DS3 Interface	NRC	$5,242.54	$4,032.72	1.30	1.20	0.92
90	Add'l Spares – Common	NRC	$106,177.94	$81,675.34	1.30	1.20	0.92
91	ADC TELECOMMUNICATIONS EQUIP.						
92	SONEPLEX						
93	Common Equipment	NRC	$44,024.03	$33,864.64	1.30	1.20	0.92
94	DS1 Port	NRC	$1,327.22	$1,020.94	1.30	1.30	1.00
95	Add'l Spares – Common	NRC	$9,721.92	$7,478.40	1.30	1.20	0.92

U S West EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
96	FUJITSU EQUIPMENT						
97	FLM-50/150 LTE						
98	Common Equipment	NRC	$57,548.44	$44,268.03	1.30	1.20	0.92
99	Channel Card Per 4 DS1s	NRC	$2,060.51	$1,585.01	1.30	1.20	0.92
100	Add'l Spares - Common	NRC	$19,397.38	$14,921.06	1.30	1.20	0.92
101	FLM-150 ADM						
102	Common Equipment	NRC	$115,783.72	$89,064.40	1.30	1.20	0.92
103	Channel Card Per 4 DS1s	NRC	$2,080.43	$1,600.33	1.30	1.20	0.92
104	Add'l Spares - Common	NRC	$41,223.59	$31,710.45	1.30	1.20	0.92
105	FLM-600 LTE						
106	Common Equipment	NRC	$300,181.62	$230,908.94	1.30	1.20	0.92
107	Channel Card Per 3 DS3s	NRC	$11,493.77	$8,841.36	1.30	1.20	0.92
108	Add'l Spares - Common	NRC	$104,090.88	$80,069.91	1.30	1.20	0.92
109	FLM-600 ADM						
110	Common Equipment	NRC	$220,378.94	$169,522.26	1.30	1.20	0.92
111	Channel Card Per 3 DS3s	NRC	$11,493.77	$8,841.36	1.30	1.20	0.92
112	Add'l Spares - Common	NRC	$82,559.98	$63,507.68	1.30	1.20	0.92
113	FLM-2400-ADM						
114	Common Equipment	NRC	$601,471.47	$462,670.36	1.30	1.20	0.92
115	Channel Card Per 3 DS3s	NRC	$6,407.18	$4,928.60	1.30	1.20	0.92
116	Add'l Spares - Common	NRC	$159,814.38	$122,934.14	1.30	1.20	0.92
117	NORTHERN TELECOM						
118	S/MDS TRANSPORT NODE-OC3						
119	Common Equipment	NRC	$100,079.34	$76,984.11	1.30	1.20	0.92
120	Channel Card Per DS3	NRC	$9,984.04	$7,680.03	1.30	1.20	0.92
121	Add'l Spares - Common	NRC	$22,463.27	$17,279.44	1.30	1.20	0.92
122	S/MDS TRANSPORT NODE-OC12						
123	Common Equipment	NRC	$175,930.21	$135,330.93	1.30	1.20	0.92
124	Channel Card Per DS3	NRC	$9,984.04	$7,680.03	1.30	1.20	0.92
125	Add'l Spares - Common	NRC	$34,232.43	$26,332.64	1.30	1.20	0.92
126	S/MDS TRANSPORT NODE-OC48						
127	Common Equipment	NRC	$577,986.24	$444,604.80	1.30	1.20	0.92
128	Channel Card Per DS3	NRC	$9,984.04	$7,680.03	1.30	1.20	0.92
129	Add'l Spares - Common	NRC	$118,461.40	$91,124.15	1.30	1.20	0.92
130	FD565 FIBER MULTIPLEXER						
131	Common Equipment	NRC	$137,941.73	$106,109.02	1.30	1.20	0.92
132	Channel Card Per DS3	NRC	$4,054.67	$3,118.98	1.30	1.20	0.92
133	Add'l Spares - Common	NRC	$46,681.79	$35,909.07	1.30	1.20	0.92
134	FMT-150D FIBER MULTIPLEXER						
135	Common Equipment	NRC	$412,919.36	$317,630.28	1.30	1.20	0.92
136	Channel Card Per DS3	NRC	$2,479.49	$1,907.30	1.30	1.20	0.92
137	Add'l Spares - Common	NRC	$17,360.10	$13,353.92	1.30	1.20	0.92
138	DMT-300 COPPER M1-3 MULTIPLEXER						
139	Common Equipment	NRC	$347,948.42	$267,652.63	1.30	1.20	0.92
140	Channel Card Per DS1	NRC	$915.79	$704.45	1.30	1.30	1.00
141	Add'l Spares - Common	NRC	$8,238.75	$6,337.50	1.30	1.20	0.92

U S West EIS Overhead Analysis

	Virtual EIS Rate Elements		Proposed Rate (a)	Direct Cost (b)	Overhead Factor (c) = (a/b)	Allowed Overhead Factor (d)	Overhead Rate Adj. Factor (e) = (d/c)
142	NEC EQUIPMENT IMT – 150 (OC 3)						
143	Common Equipment	NRC	$111,145.07	$85,496.21	1.30	1.20	0.92
144	DS1 Interface Card	NRC	$437.98	$336.91	1.30	1.30	1.00
145	DS3 Interface Card	NRC	$6,118.50	$4,706.54	1.30	1.20	0.92
146	Add'l Spares	NRC	$44,116.93	$33,936.10	1.30	1.20	0.92
147	ITS – 600 (OC 12)						
148	Common Equipment	NRC	$214,804.60	$165,234.31	1.30	1.20	0.92
149	DS3 Interface Card	NRC	$3,799.19	$2,922.45	1.30	1.20	0.92
150	Add'l Spares	NRC	$82,772.34	$63,671.03	1.30	1.20	0.92
151	ITS – 2400 (OC 48)						
152	Common Equipment	NRC	$640,677.67	$492,828.98	1.30	1.20	0.92
153	DS3 Interface Card	NRC	$3,799.19	$2,922.45	1.30	1.20	0.92
154	Add'l Spares	NRC	$189,301.98	$145,616.91	1.30	1.20	0.92
155	RC – 28D ASYNC M–X3 Mux (optional)						
156	Common Equipment	NRC	$79,799.36	$61,384.12	1.30	1.20	0.92
157	Add'l Spares	NRC	$14,931.27	$11,485.59	1.30	1.20	0.92

Before the
Federal Communications Commission
Washington, D.C.

DA 94-1422

In the matter of	)	
	)	
Century Cable TV	)	CUID Nos. IN0094, WV0156,
	)	WV0378, KY0120,
Benchmark Filings To Support	)	AZ0019
Cable Programming Service Prices	)	

Memorandum Opinion and Order

Adopted: December 9, 1994 Released: December 12, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider complaints about the prices Century Cable TV ("Century") charges for its cable programming service ("CPS") tiers in Muncie, Indiana (CUID No. IN0094); Morgantown, West Virginia (CUID No. WV0156); Huntington, West Virgina (CUID No. WV0378); Owensboro, Kentucky (CUID No. KY0120); and Yuma, Arizona (CUID No. AZ0019). Rather than attempting to justify its prices through a benchmark or cost of service showing, Century responded to the complaints by stating that it has no has a CPS tier in those systems.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[1] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[2] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[2] 47 C.F.R. § 76.956.

cost-of-service showing.[3] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[4]

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[9]

Procedural Matters

4. The Cable Services Bureau released an order resolving a letter of inquiry ("LOI") regarding Century's system in Huntington on November 25, 1994. On December 2, 1994, the Bureau released LOI orders for Century's systems in Muncie, Morgantown, Owensboro, and Yuma.[10] The orders addressed the restructured service offerings implemented in these franchise areas beginning September 1, 1993, in which Century eliminated its CPS tier and offered instead only a basic service tier and a few a la carte channels.[11] In each of these orders, the Bureau found that Century's restructured service offerings do not constitute a clear evasion of our rate rules. Specifically, Century did not avoid rate regulation of most of

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[3] 47 C.F.R. § 76.956(b).

[4] *Id.*

[5] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[6] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[7] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[8] *Id.*

[9] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[10] *See* DA 94-1314; DA 94-1354; DA 94-1358; DA 94-1361; DA 94-1360.

[11] Century offered three a la carte channels in all of the franchise areas except Muncie, where it offered four a la carte channels.

its previous CPS channels because it moved those channels into a rate-regulated basic tier. With regard to the other channels, the orders permit Century to treat its a la carte packages as new product tiers that may be priced at market levels under our recently adopted *Going Forward Order*.[12]

Discussion

5. Except in certain limited circumstances,[13] the Commission's authority to regulate cable service rates is limited to the rates charged for CPS tiers.[14] As mentioned above, the Commission's jurisdiction to regulate CPS tiers is triggered by the filing of an FCC Form 329 complaint. Since our recent LOI orders found that the elimination of Century's CPS tiers does not constitute a clear evasion of rate regulation and those channels not placed on the basic service tier could be treated as a new product tier, there was no CPS tier subject to rate regulation pursuant to Section 76.922 of our rules as of September 1, 1993 in the above-mentioned franchise areas. Therefore, all FCC Form 329 complaints filed against Century in each of these franchise areas will be dismissed. We note, however, that if Century created a CPS tier, the CPS tier would be subject to our jurisdiction if a valid complaint is subsequently filed.

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[12] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking,* MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994).

[13] Upon the denial or revocation of a franchising authority's certification, the Commission will regulate rates for basic service and associated equipment and installations for a system not subject to effective competition until the franchising authority has obtained certification or recertification. 47 U.S.C. § 543(a)(6); 47 C.F.R. § 76.913(a). In addition, a franchising authority unable to meet certification standards may petition the Commission to regulate rates for basic service and associated equipment and installations, if certain conditions are satisfied. 47 C.F.R. § 76.913(b).

[14] *See* 47 U.S.C. § 543(c)(1).

Conclusion

6. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that all FCC Form 329 complaints pending against Century Cable TV's CPS rates in Muncie, Indiana (CUID No. IN0094); Morgantown, West Virginia (CUID No. WV0156); Huntington, West Virgina (CUID No. WV0378); Owensboro, Kentucky (CUID No. KY0120); and Yuma, Arizona (CUID No. AZ0019) are DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94-315
Washington, D.C. 20554

In the Matter of	)	
	)	
JAMES A. KAY, JR.	)	
	)	WT Docket No. 94-147
Licensee of one hundred sixty four Part 90 licenses in the Los Angeles, California area.	)	

ORDER TO SHOW CAUSE,
HEARING DESIGNATION ORDER AND
NOTICE OF OPPORTUNITY FOR HEARING FOR FORFEITURE

Adopted: December 9, 1994 **Released:** December 13, 1994

By the Commission:

1. James A. Kay, Jr. (Kay), holder of one hundred sixty four land mobile licenses[1] authorized under Part 90 of the Commission's Rules, 47 C.F.R. § 90.1 et seq., has failed to respond to Commission requests for written statements of fact required under Section 308 of the Communications Act of 1934 as amended (the "Act").[2] In addition, on the basis of our investigation and complaints from other licensees, we have reason to believe that Kay has failed to comply with the Act and the Commission's Rules, and may not possess the character qualifications necessary to be a Commission licensee. For the reasons that follow, pursuant to Section 312 of the Act,[3] we will order Kay to show cause why his licenses should not be revoked or cancelled, why he should not be ordered to cease and desist from certain violations of the Act and the Commission's Rules, why an order for forfeiture should not issue, and will designate these matters for a hearing before an Administrative Law Judge.

2. The Commission has received a number of complaints regarding the construction and operation of a number of Kay's licensed facilities. We have received reports that Kay may not have constructed, or may have deconstructed a number of the stations for which he is licensed. Many of these stations are licensed to operate from mountain peaks managed by the U.S. Forest Service in the Los Angeles area, and U.S. Forest Service permits therefore are required to construct and operate on the peaks. We also have received complaints from competitors alleging that Kay is falsely reporting the number of mobile units he serves (referred to as loading) in order to avoid the channel sharing and recovery provisions of our rules. In a FCC field office inspection to verify the accuracy of a complaint, it was found that Kay was operating a conventional station in the trunked mode in violation of Section

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[1] See Appendix A.

[2] 47 U.S.C. § 308.

[3] 47 U.S.C. § 312.

90.113.[4]

3. Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions; for example, Kay may inflate his loading by reporting the same mobile users on multiple licenses. We believe these names include some or all of the following: Air Wave Communications; John C. Allen dba Buddy Sales; Buddy Corp.; Buddy Sales; Buddys Sales; Buddy Corp. dba Buddy Sales; Buddy Corp. dba Southland Communications; Consolidated Financial Holdings; Hessman Security; James Kay; James A. Kay, Jr.; Lucky's Two Way Radio; Luckys Two Way Radio; Luckys Two Way Radios; MetroComm; Multiple M Enterprises, Inc.; Oat Trunking Group; Oat Trunking Group, Inc.; Marc Sobel dba Airwave Communications; Southland Communications; Southland Communications, Inc.; Steve Turelak; Triple M Enterprises, Inc.; V&L Enterprises; and VSC Enterprises.

4. We also have information that Kay may willfully cause interference to radio systems, including systems carrying public safety communications traffic, in order to coerce or mislead licensees into retaining him as their communications provider. After allegedly causing interference to the radio systems of others, Kay or his sales staff allegedly calls on the persons experiencing the interference and offers to provide them higher quality communications service.

5. Information before us indicates that Kay and his sales staff have misused the Commission's processes by, for example, fraudulently inducing licensees and others to sign blank Commission forms seeking modification of licenses, or to sign forms the intent of which was misrepresented by Kay or his employees. This reportedly involves Kay or his staff offering to provide ancillary repeater service to land mobile licensees that operate mobiles that communicate through a repeater (mounted on a tower, mountain top or edifice). Kay allegedly then used the forms to cancel the licenses, modify the licenses, or obtain control of the licenses by having them assigned to himself. Kay then provides communication service on the spectrum formerly licensed to the customer. The customer, in some instances, does not realize for years that Kay has misappropriated its license.

6. On January 31, 1994, Commission staff requested information from Kay to determine whether Kay had committed rule violations by not meeting the construction and placed-in-operation requirements of the Commission's Rules.[5] 47 C.F.R. §§ 90.155, 90.631 and 90.633. The staff's letter also requested information to enable the staff to determine if stations licensed to Kay have permanently discontinued operation in violation of our rules. 47 C.F.R. § 90.157. Finally, the letter directed Kay to provide information detailing the loading of end users on Kay's base stations in order to assess Kay's compliance with the channel loading requirements of our rules. 47 C.F.R. §§ 90.313, 90.623, 90.627, 90.631 and 90.633. In order to assess compliance with our construction and operation requirement, the staff requested that Kay identify the stations for which he holds FCC licenses as well as those he manages. The staff directed Kay to note those that are on U.S. Forest Service land. The inquiry letter sent to Kay also directed that he identify all station licenses he holds under all names under which he does business.

7. The letter also requested that Kay substantiate the loading of his

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[4] Inspection of Station WNWK982 at Mount Lukens, CA conducted July 22, 1994 by the FCC's Los Angeles Field Office Bureau.

[5] Letter from W.Riley Hollingsworth, Deputy Chief, Licensing Division, Private Radio Bureau, to James A. Kay, Jr. dated January 31, 1994.

stations by providing customer lists and telephone numbers. Such business records are the Commission's generally acceptable proof of loading. Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End User of Specialized Mobile Radio Systems, 7 FCC Rcd 5558, 5560 (1992). Kay was later assured that proprietary information would be considered confidential.

8. Kay filed a response, but it provided none of the requested information. He simply referenced some unrelated information provided to the Commission staff at other times. Kay failed to provide the requested information after numerous extensions of time, responding at one point that "there is no date...for which the submission of the requested information would be convenient."

9. We will designate this matter for hearing to determine Kay's fitness to remain a Commission licensee, in light of his alleged violations of the Communications Act and the Commission's Rules, his alleged misconduct, and his refusal to respond to the Commission inquiry.

10. Accordingly, IT IS ORDERED that pursuant to Sections 312(a) and (c) of the Act, James A. Kay, Jr. is directed to show cause why his licenses in the Private Land Mobile Radio Services should not be revoked or cancelled[6] at a hearing before an Administrative Law Judge, at a time and place to be designated in a subsequent Order, upon the following issues:

a) To determine whether James A. Kay, Jr. has violated Section 308(b) of the Act[7] and/or Section 1.17 of the Commission's Rules,[8] by failing to provide information requested in his responses to Commission inquiries;

b) To determine whether James A. Kay, Jr. has willfully or repeatedly operated a conventional station in the trunked mode in violation of Section 90.113 of the Commission's Rules;

c) To determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Sections 90.155, 90.157, 90.313, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules;[9]

d) To determine whether James A. Kay, Jr. has abused the Commission's processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Sections 90.623 and 90.629;

e) To determine whether James A. Kay, Jr. willfully or maliciously interfered with the radio communications of other systems, in violation of Sections 333 of the Act;[10]

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[6] Several of the rule violations discussed above are subject to an automatic cancellation condition: if the licensee does not meet his or her construction deadline, or if the licensee permanently discontinues operation, the license cancels automatically. See e.g., 47 C.F.R. §§ 90.157, 90.631 and 90.633.

[7] 47 U.S.C. § 308.

[8] 47 C.F.R. § 1.17.

[9] 47 C.F.R. §§ 90.155, 90.157, 90.313, 90.623, 90.627, 90.631, and 90.633.

[10] 47 U.S.C. § 333.

f) To determine whether James A. Kay, Jr. has abused the Commission's processes in order to obtain cancellation of other licenses;

g) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether James A. Kay, Jr. is qualified to remain a Commission licensee;

h) To determine if any of James A. Kay, Jr.'s licenses have automatically cancelled as a result of violations listed in subparagraph (c) pursuant to Sections 90.155, 90.157, 90.631 or 90.633 of the Commission's rules; and

11. IT IS FURTHER ORDERED that pursuant to Sections 312(b) and (c) of the Act Kay is directed to show cause why he should not be ordered to cease and desist from failing to operate his Private Land Mobile Radio licenses substantially as set forth in the licenses, from violating Sections 308(b) and 333 of the Act, from violating Commission Rules Sections 1.17, 90.155, 90.157, 90.313, 90.623, 90.627, 90.629, 90.631, 90.633[11] and/or from abuse of processes as described in paragraph 10.

12. IT IS FURTHER ORDERED that the above issues be consolidated for hearing pursuant to § 1.227(a)2) of the Commission's Rules.[12]

13. IT IS FURTHER ORDERED that the Chief, Wireless Telecommunications Bureau SHALL BE a party to the proceeding.

14. IT IS FURTHER ORDERED, that to avail himself of the opportunity to be heard pursuant to Section 1.91(c) of the Commission's rules,[13] Kay, in person or by attorney, shall file with the Commission within thirty (30) days of the receipt of the Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, a written appearance stating that he will appear at the hearing and present evidence on the matters specified in the Order. If a party fails to file an appearance within the time specified, the right of that party to a hearing shall be deemed to have been waived. See Section 1.92(a) of the Commission's rules.[14] Where a hearing is waived, a written statement in mitigation or justification may be submitted within thirty (30) days of the receipt of the Order. See Section 1.92(a) of the Commission's rules. In the event the right to a hearing is waived by the party to this proceeding, the presiding Officer, or the Chief Administrative Law Judge if no presiding officer has been designated, will terminate the hearing proceeding and certify the case to the Commission in the regular course of business and an appropriate order will be entered. See Section 1.92(c) of the Commission's rules.

15. IT IS FURTHER ORDERED that pursuant to Section 312(d) of the Act[15], the burden of proceeding with the introduction of evidence and the burden of proof shall be on the Commission.

16. IT IS FURTHER ORDERED that irrespective of whether Kay is determined to be qualified to be a Commission licensee, or it is determined

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[11] 47 C.F.R. §§ 1.17, 90.155, 90.157, 90.623, 90.627, 90.631, and 90.633.

[12] 47 C.F.R. § 1.227(a)(2).

[13] 47 C.F.R. § 1.91(c).

[14] 47 C.F.R. § 1.92(c).

[15] 47 U.S.C. § 312(d).

appropriate to revoke or cancel any or all of his licenses, it shall be determined, pursuant to Section 503 of the Act,[16] whether an ORDER FOR FORFEITURE shall be issued against James A. Kay, Jr. for willful and/or repeated violations of the Act and the Commission's Rules discussed in the preceding paragraphs in an amount not to exceed $10,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $75,000 for any single act or failure to act.

17. IT IS FURTHER ORDERED that in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Act.

18. IT IS FURTHER ORDERED that the Secretary send a copy of this order via certified mail-return receipt requested to Dennis K. Brown, Esquire, Brown and Schwaninger, P.C., 1835 K Street N.W., Suite 650, Washington, D.C. 20006, and have this order or a summary thereof published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[16] 47 U.S.C. § 503(b).

Appendix A

The following call signs are held in the name of James A. Kay, Jr.:

	Call Sign	Service	California Area
1.	KJV843	Business	Montrose Upland Signal Hill Malibu Lake Northridge Van Nuys
2.	WEC934	Business	Montrose Northridge Van Nuys
3.	WIE974	Business	Montrose Northridge Van Nuys
4.	WIF759	Business	Montrose Upland Reseda
5.	WIH315	Business	Montrose Northridge Van Nuys
6.	WIH339	Business	Montrose Corona Northridge Van Nuys
7.	WIH681	Business	Northridge Rancho Palos Verdes Van Nuys
8.	WIH868	Business	Montrose Corona Upland Van Nuys
9.	WIH872	Business	Montrose Upland Signal Hill Malibu Lake Corona Van Nuys
10.	WIH886	Business	Montrose Northridge Van Nuys

The following call signs are held in the name of James A. Kay, Jr. (cont.):

	Call Sign	Service	California Area
11.	WIH946	Business	Corona Upland
12.	WII253	Business	Northridge Malibu Lake Reseda Valencia Canyon Country Simi Valley
13.	WII619	Business	Montrose Northridge Malibu Lake Van Nuys
14.	WII621	Business	Sylmar Northridge Reseda
15.	WII695	Business	Montrose Upland Signal Hill Malibu Lake Corona Van Nuys
16.	WII697	Business	Sylmar Malibu Lake Northridge Van Nuys
17.	WII755	Business	Montrose Northridge Van Nuys
18.	WII787	Business	Montrose Northridge Van Nuys
19.	WII874	Business	Montrose Northridge Malibu Lake Van Nuys
20.	WII905	Business	Montrose Northridge Van Nuys

The following call signs are held in the name of James A. Kay, Jr. (cont.):

	Call Sign	Service	California Area
21.	WII909	Business	Northridge Malibu Lake Van Nuys
22.	WIJ267	Business	Northridge Malibu Lake Van Nuys
23.	WIJ310	Business	Montrose Northridge Van Nuys
24.	WIJ316	Business	Montrose Upland Signal Hill Malibu Lake Corona Van Nuys
25.	WIJ343	Business	Montrose Northridge Santa Paula Van Nuys
26.	WIJ362	Business	Montrose Northridge Malibu Lake Newbury Park Van Nuys
27.	WIJ533	Business	Montrose Northridge Van Nuys
28.	WIJ635	Business	Montrose Upland Signal Hill Malibu Lake Corona Van Nuys
29.	WIJ644	Business	Montrose Northridge Van Nuys

The following call signs are held in the name of James A. Kay, Jr. (cont.):

	Call Sign	Service	California Area
30.	WIJ663	Business	Northridge Malibu Lake Van Nuys
31.	WIJ700	Business	Montrose Northridge Van Nuys
32.	WIJ704	Business	Montrose Los Angeles Northridge Malibu Monte Nido Van Nuys
33.	WIJ712	Business	Montrose Northridge Van Nuys
34.	WIJ754	Business	Montrose Upland Signal Hill Malibu Lake Corona Van Nuys
35.	WIJ831	Business	Montrose Malibu Lake Northridge Van Nuys
36.	WIJ867	Business	Montrose Los Angeles Van Nuys
37.	WIJ893	Business	Northridge Upland Malibu Lake Reseda Newhall

The following call signs are held in the name of James A. Kay, Jr. (cont.):

	Call Sign	Service	California Area
38.	WIJ992	Business	Montrose Northridge Reseda Van Nuys Newhall
39.	WIJ994	Business	Encino Northridge Newhall Canyon County Los Angeles Acton
40.	WIK205	Business	Montrose Upland Signal Hill Malibu Lake Corona Van Nuys
41.	WIK208	Business	Newbury Park Santa Paula Van Nuys
42.	WIK216	Business	Corona
43.	WIK220	Business	Sun Valley
44.	WIK261	Business	Montrose Upland Signal Hill Malibu Lake Corona Van Nuys
45.	WIK270	Business	Corona
46.	WIK278	Business	Van Nuys Northridge Canoga Park
47.	WIK287	Business	Corona
48.	WIK293	Business	Corona

The following call signs are held in the name of James A. Kay, Jr. (cont.):

	Call Sign	Service	California Area
49.	WIK294	Business	Montrose Northridge Van Nuys
50.	WIK303	Business	Montrose Upland Signal Hill Van Nuys
51.	WIK304	Business	Canyon Country Newhall Canoga Park
52.	WIK308	Business	Los Angeles Glendale West Hills
53.	WIK310	Business	Corona
54.	WIK312	Business	Newhall Canoga Park
55.	WIK329	Business	Northridge
56.	WIK330	Business	Northridge
57.	WIK331	Business	Corona
58.	WIK332	Business	Corona
59.	WIK373	Business	Montrose Northridge Santa Paula Van Nuys
60.	WIK374	Business	Corona
61.	WIK376	Business	Corona Newport Beach San Bernardino
62.	WIK377	Business	Montrose Northridge Van Nuys

The following call signs are held in the name of James A. Kay, Jr. (cont.):

	Call Sign	Service	California Area
63.	WIK390	Business	Santa Paula Newberry Park Reseda
64.	WIK400	Business	Montrose Northridge Van Nuys
65.	WIK599	Business	Corona
66.	WIK611	Business	Corona
67.	WIK613	Business	Upland Corona
68.	WIK660	Business	Northridge Newbury Park Van Nuys
69.	WIK664	Business	Corona
70.	WIK708	Business	Corona
71.	WIK726	Business	Corona
72.	WIK727	Business	Corona
73.	WIK761	Business	Northridge
74.	WIK762	Business	Northridge
75.	WIK823	Business	Corona
76.	WIK875	Business	Corona
77.	WIK878	Business	Montrose Upland Signal Hill Malibu Lake Corona Van Nuys
78.	WIK896	Business	Corona Upland

The following call signs are held in the name of James A. Kay, Jr. (cont.):

	Call Sign	Service	California Area
79.	WIK951	Business	Northridge Malibu Lake Van Nuys
80.	WIK983	Business	Corona
81.	WIL235	Business	Corona
82.	WIL256	Business	Corona
83.	WIL260	Business	Corona
84.	WIL342	Business	Corona
85.	WIL350	Business	Corona
86.	WIL372	Business	Montrose Northridge Corona Van Nuys
87.	WIL392	Business	Northridge Rancho Palos Verde Van Nuys
88.	WIL415	Business	Montrose Northridge Van Nuys
89.	WIL432	Business	Montrose Corona Northridge Van Nuys
90.	WIL436	Business	Corona
91.	WIL441	Business	Corona
92.	WIL442	Business	Corona
93.	WIL458	Business	Corona
94.	WIL462	Business	Los Angeles
95.	WIL469	Business	Corona

The following call signs are held in the name of James A. Kay, Jr. (cont.):

	Call Sign	Service	California Area
96.	WIL522	Business	Montrose Upland Signal Hill Northridge Corona Los Angeles
97.	WIL574	Business	Van Nuys
98.	WIL625	Business	Montrose Corona Van Nuys
99.	WIL653	Business	San Pedro
100.	WIL659	Business	Santa Paula
101.	WIL663	Business	Signal Hill Malibu Lake Van Nuys
102.	WIL665	Business	Montrose Los Angeles Northridge Van Nuys
103.	WIL697	Business	Montrose Corona Northridge Van Nuys
104.	WIL729	Business	Montrose Upland Signal Hill Malibu Lake Corona Van Nuys
105.	WIL733	Business	Corona Signal Hill Montrose Los Angeles Northridge Malibut Monte Nido Van Nuys

The following call signs are held in the name of James A. Kay, Jr. (cont.):

	Call Sign	Service	California Area
106.	WQP957	Business	Northridge Malibu Lake Van Nuys
107.	WNIZ676	Commercial/ Conventional	Corona Upland
108.	WNJA910	Commercial/ Trunked	Corona Northridge Newbury Park
109.	WNJL306	Commercial/ Trunked	Corona
110.	WNKV762	Commercial/ Trunked	Banning Running Springs
111.	WNMT755	Commercial/ Conventional	Corona Montrose
112.	WNMY402	Commercial/ Trunked	Malibu Lake Montrose Corona
113.	WNMY773	Commercial/ Conventional	Corona Crestline Montrose
114.	WNPJ874	Commercial/ Trunked	Newbury Park Montrose Corona
115.	WNQK532	Business	Montrose Northridge
116.	WNQK959	Business/ Trunked	Banning
117.	WNSK552	Commercial/ Trunked	Running Springs Malibu Lake
118.	WNVL794	Commercial/ Conventional	Montrose Corona Running Springs

The following call signs are held in the name of James A. Kay, Jr. (cont.):

	Call Sign	Service	California Area
119.	WNVW779	Commercial/ Conventional	Upland Corona Glendora Montrose Altadena
120.	WNWB268	Commercial/ Conventional	Montrose Corona Running Springs
121.	WNWB332	Commercial/ Conventional	Montrose Corona Running Springs
122.	WNWK982	Commercial/ Conventional	Montrose Corona Running Springs
123.	WNWN703	Commercial/ Conventional	Montrose Corona Running Springs
124.	WNWQ651	Commercial/ Conventional	Montrose Corona Running Springs
125.	WNXB280	Commercial/ Conventional	Altadena Montrose Upland
126.	WNXC713	Business	Van Nuys Northridge Montrose
127.	WNXG372	Commercial/ Conventional	Montrose Corona
128.	WNXQ353	Commercial/ Conventional	Corona Montrose
129.	WNXQ911	Commercial/ Conventional	Montrose Corona Running Springs
130.	WNXS450	Commercial/ Conventional	Montrose Corona

The following call signs are held in the name of James A. Kay, Jr. (cont.):

	Call Sign	Service	California Area
131.	WNXS753	Commercial/ Conventional	Corona Montrose Running Springs
132.	WNXW280	Commercial/ Conventional	Corona Upland
133.	WNXW327	Commercial/	Corona Running Springs Banning
134.	WNXW549	Commercial/ Conventional	Montrose Corona
135.	WNYQ437	Commercial/ Conventional	Corona
136.	WNYR747	Commercial/ Conventional	Montrose Corona
137.	WNZL447	Business	Montrose Northridge Van Nuys
138.	WNZY505	Commercial/ Conventional	Corona
139.	WNZZ731	Commercial/ Conventional	Corona Upland
140.	WPAP683	Commercial/ Conventional	Montrose Corona Banning
141.	WPAZ639	Commercial/ Conventional	Northridge
142.	WPBR746	Business	Sylmar
143.	WPBW517	Commercial/ Conventional	Northridge
144.	WPBX246	Business	Northridge Montrose Sylmar

The following call signs are held in the name of James A. Kay, Jr. (cont.):

	Call Sign	Service	California Area
145.	WPBX247	Business	Montrose Northridge
146.	WPBZ518	Commercial/ Conventional	Upland Corona Montrose
147.	WPEE253	Business	Acton Corona Montrose

The following call signs are held by Buddy Corp.:

	Call Sign	Service	California Area
148.	WNCW259	Business	Acton
149.	WNKV830	Business/ Trunked	Ventura
150.	WNXW487	Business/ Conventional	Running Springs Corona

The following call signs are held in the name of Oat Trunking Group, Inc.:

	Call Sign	Service	California Area
151.	WNLM440	Business/ Trunked	Van Nuys
152.	WNXM915	Business/ Conventional	Van Nuys

The following call sign is held in the name of Multiple M Enterprises, Inc.: Kay Jr., James A. LP:

	Call Sign	Service	California Area
153.	WYA205	Business/ Trunked	Gardena

The following call signs are held in the name of Marc Sobel:

	Call Sign	Service	California Area
154.	KD53189	Business	Sepulveda
155.	KNBT299	Business/ Conventional	North Hills
156.	KRU576	Business/ Conventional	North Hills
157.	WIH718	Business/ Conventional	North Hills

The following call signs are held in the name of Marc Sobel (cont.):

	Call Sign	Service	California Area
158.	WIJ516	Business	Sepulveda
159.	WIJ698	Business	Sepulveda
160.	WIJ716	Business	Sepulveda
161.	WIK548	Business	North Hills
162.	WIK833	Business	Sepulveda
163.	WIK834	Business	Sepulveda
164.	WIL516	Business	North Hills